



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

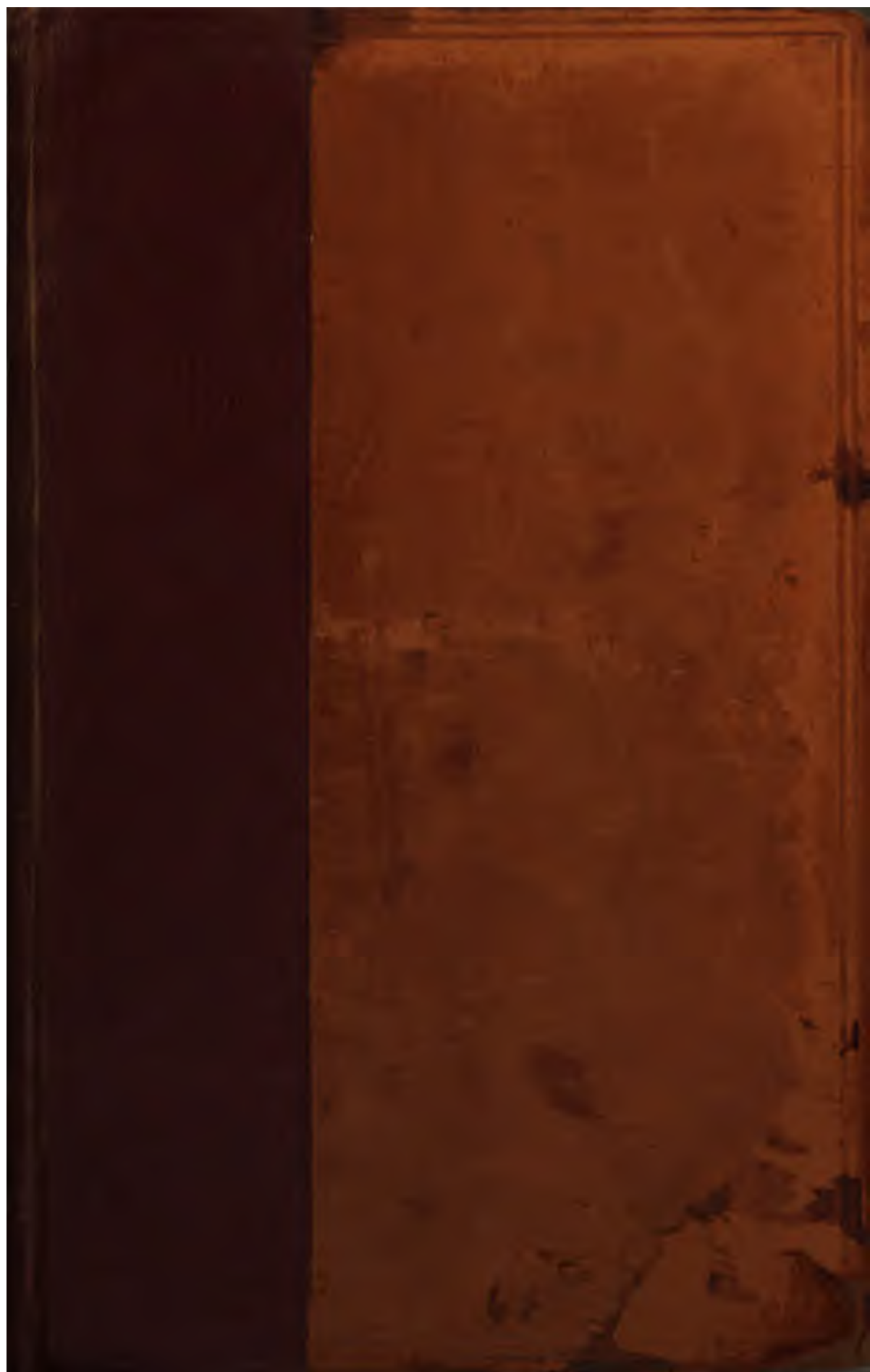
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



L. Eng. C 17 d. 24
1(2)

OW. 8. 2.

7. 500

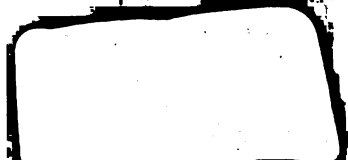
1058 a 14 a

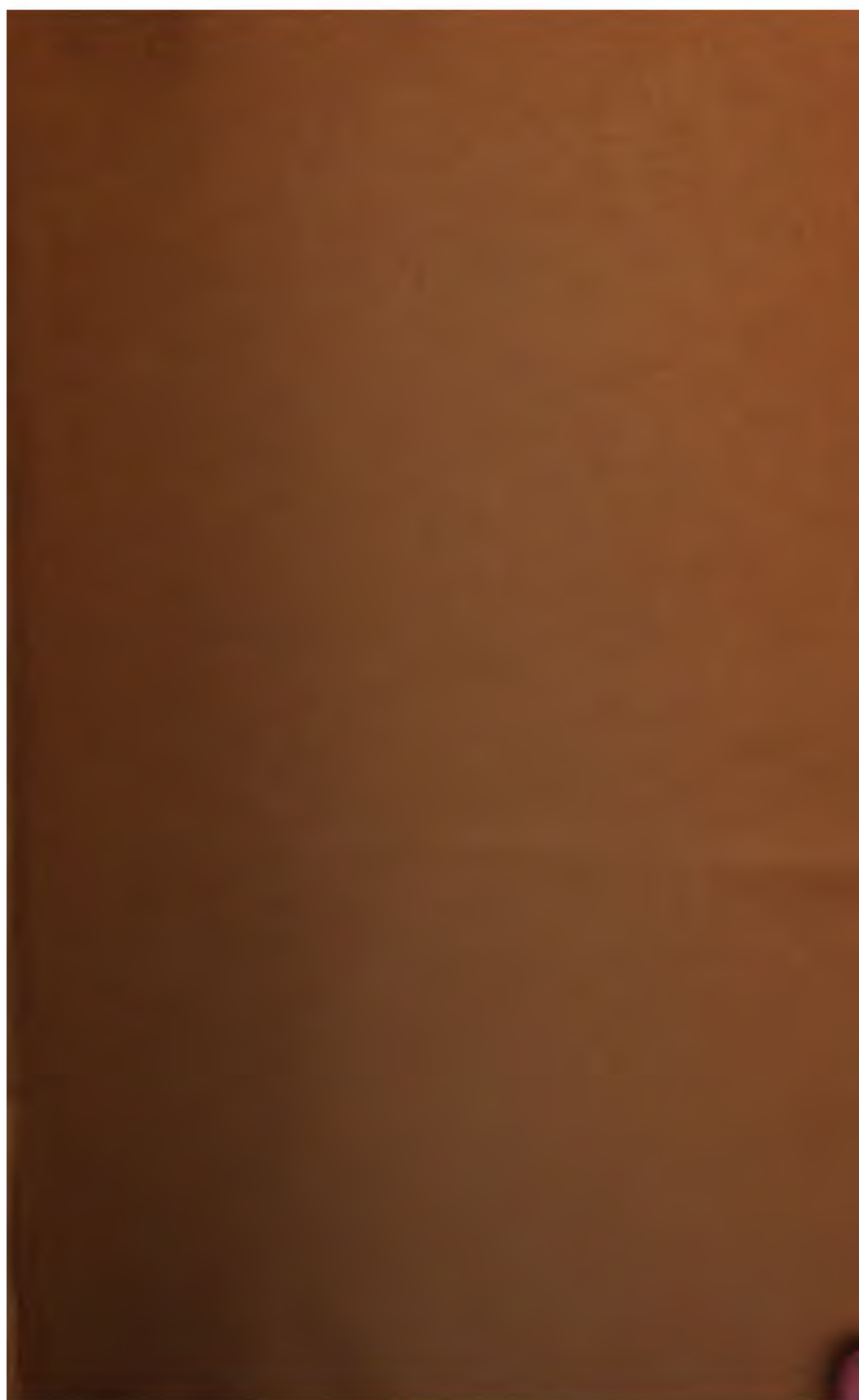
1-1

U.S.A.

510

W. 524





A SELECTION
OF
LEADING CASES IN EQUITY,

With Notes.

BY
F. T. WHITE AND O. D. TUDOR
OF THE MIDDLE TEMPLE, ESQ., BARRISTERS-AT-LAW.

With Annotations,

CONTAINING REFERENCES TO AMERICAN CASES,

BY
J. I. CLARK HARE AND H. B. WALLACE.

Fourth American, from the Fourth London Edition.

WITH
ADDITIONAL NOTES AND REFERENCES TO AMERICAN DECISIONS,

BY
J. I. CLARK HARE.

IN TWO VOLUMES.

VOL. I.
Part Second.

PHILADELPHIA:
T. & J. W. JOHNSON & CO.,
LAW BOOKSELLERS AND PUBLISHERS,
No. 635 CHESTNUT STREET.
1876.



Entered, according to Act of Congress, in the year 1876,
BY J. I. CLARK HARE,
In the Office of the Librarian of Congress, at Washington.

Entered, according to Act of Congress, in the year 1850,
BY J. I. CLARK HARE,
In the Clerk's Office of the District Court, for the Eastern District of Pennsylvania.

Entered, according to Act of Congress, in the year 1852,
BY H. B. WALLACE,
In the Clerk's Office of the District Court, for the Eastern District of Pennsylvania.

Entered, according to Act of Congress, in the year 1849,
BY T. & J. W. JOHNSON & CO.,
In the Clerk's Office of the District Court, for the Eastern District of Pennsylvania.



KING & BAIRD, PRINTERS,
607 Sansom Street, Philadelphia.

J.
.
.
.
.
.
.
.
-Co
v. I
to pe
HER
H v. S
LE v.
R v.
spect
v. L
v. I
v. PU
v. R
SET (I
v. TU

U.S. Treasury Dept.

K
.W584c
v.1
pt. 2.

LIST OF CASES REPORTED

IN

VOLUME I. PART II

	PAGE
JOYD v. SMITHSON (Resulting trust, on failure of the purposes for which conversion has been directed) . . .	1171
STER (DUKE OF) v. MAYER (Primary liability of personal estate to payment of debts—Exoneration) . . .	881
TERFIELD (EARL OF) v. JANSSEN (Post-obit securities—Catching bargains with heirs, expectants, and reversioners—Confirmation)	773
EE v. RUTTER (Specific performance of agreements relating to personal property)	1063
CHER v. ASHBURNER (Conversion)	1118
H v. SIR J. H. COTTON (Equitable waste)	955
EE v. TENANT (Wife's separate estate)	679
ER v. FOXCROFT (Part performance of parol contract respecting land)	1027
EH v. LEE (Tacking incumbrances)	837
RAY v. LORD ELIBANK (Wife's equity to a settlement) . . .	629, 634
Y v. PUSEY (Specific delivery up of chattels)	1109
SEL v. RUSSEL (Equitable mortgage by deposit of title-deeds) . . .	931
ERSET (DUKE OF) v. COOKSON (Specific delivery up of chattels) . . .	1110
AD v. TURNER (Donatio mortis causâ)	1205

MURRAY v. LORD ELIBANK.

JUNE 6, JULY 30, 31, 1804.

REPORTED IN VES. 84.

Right of children to a provision out of the property of their mother, under a decree directing a settlement by the husband on her and her children, notwithstanding her death before the report. Demurrer to the bill of the children was overruled.

THE bill was filed by the infant children of Lord Elibank, stating the p^{ro}ceedings in the cause *Lady Elibank v. Montolieu*, and the decree of the Master to approve a proper settlement to be made by the defendant Lord Elibank on the plaintiff Lady Elibank, and her children by him, regard being had to the extent of the fortune and the settlement already made upon her by Lord Elibank. [*432]

The bill farther stated, that before any report Lady Elibank died intestate; and prayed that it may be declared, that the plaintiffs and the defendant Alexander Murray, another child of Lord and Lady Elibank, have, under the decree of the 19th February, 1804, a right to have a provision made for them out of the said one-fourth of the personal estate of Lady Cranstown: and that it may be referred to the Master to approve of a proper settlement to be made by the defendant Lord Elibank upon the plaintiffs and the defendant Alexander Murray, being all the children; regard being had to the extent of the fortune of Lady Elibank, and the settlement already made by Lord Elibank.

To this bill the defendant Montolieu put in a demurrer.

Mr. Alexander and Mr. Cooke, in support of the bill.—The question is, whether the children are entitled to sustain a supplemental suit, so as to have the benefit of the decree. This right is purely a creature of the Courts of equity of this country. Upon principle, why should the interest, given by the decree to particular persons, beyond the interest of the parent, depend upon the accident of death? But the interest of the children rests most safely on the uniform practice. In *Rowe v. Jackson*,¹ it was said by Mr. Madocks, and assented to by the Court, that, where a husband sues for his wife's fortune, and is decreed to make a proposal for a settlement, and the wife dies, the husband shall be compelled to carry it into execution for the children; and he cited a manuscript case for that, and observed, that the same thing was said by Lord Thurlow in 1779, upon a motion by Mr. Mansfield; but it is otherwise if the wife dies before the decree. It is now decided, that the creditors of the husband are

¹ 2 Dick, 604, stated also from a manuscript note of Mr. Romilly.

exactly in the same situation. An order was made by Lord Alvanley, enforcing the equity for the children, after the death of the wife, even against the assignment of the husband. It does [*433] not appear whether the husband had *carried in a proposal before the death of the wife, or before the assignment; but that cannot make a difference, as the mere proposal could not bind more than the decree, in obedience to which it is made. The rule is now clearly settled, that the children have, through their mother, an interest in her fortune. The uniform language of the Court is, that the husband shall go before the Master, and lay proposals for a settlement upon the wife and children. It appears from *Hearle v. Greenbank*,¹ that Lord Hardwicke so considers it, and seems to think that a decree might be made after the death of the wife, the children, even after her death, having a right against the father's provision. But here is a decree, establishing this right for children in the life of the wife, and the settlement is to be considered as made at the date of the decree, and in the nature of an agreement sanctioned by the Court, giving the husband the fortune upon terms. In *Martin v. Mitchell*, the case before Lord Thurlow in 1779, the Court, after the death of the wife before a settlement, carried the proposal into execution against an assignment to a creditor.

Mr. Richards and Mr. W. Agar, in support of the demurrer.— In the case, either of a sum of money, the property of a married woman, which belongs to her husband in her right, or a bond or note, a chose in action, or what Lord Alvanley called a chose in equity, which the husband may recover, but, if he does not, will survive, the debtor may pay the husband who may release him. It is his property, subject to the contingency of survivorship. A Court of equity will not assist him, unless he will make a settlement; but, if the wife does not desire a settlement, the Court will not make one for her; and it has been held, that the Court cannot refuse to the wife the power of giving the property to her husband. It is the property of the husband, to be extended to the wife and children, if she thinks fit; but the Court would not, upon her desire in court, permit her to give it to any one else, as she might, if it was hers, independent of the equity the Court [*434] attaches upon it. Having not the property, but an *equity only, she has no interest to give up. There is no analogy, therefore, to the case of a fine, in which an interest does pass. The trustee is justified in paying the husband; but, if the wife had an interest in it, he would be answerable for that to her.

But supposing the wife to have some interest, can the children, have any? If she is dead, they cannot come here for a settlement: *Scriven v. Tapley*.² It is said, the Court has, by the decree, given them an interest. They were not parties before the Court at the time that decree was made. They have no more in-

¹ 3 Atk. 695. See *Ib.* p. 717.

² Amb. 509. 2 Eden 337.

terest in the property than a stranger; but are considered by the Court in a manner comprehended in the mother, while she exists, who is therefore allowed to extend her plan of provision to them, but not as distinct and separate objects, having an interest independent of her. Suppose Lady Elibank had waived the order for a settlement, and desired the money to be paid to her husband, the Court, considering, the equity hers, would have held, that she might disappoint her children. The proposal, not completed and carried into execution by the Court, is only an offer; and, if the wife dies before it is carried into execution, the husband is remitted to his legal right. In all these cases, everything is given with reference to the wife—nothing independent of her. Only two authorities are produced for making any order for the benefit of the issue of the marriage after the death of the wife; the one, *Rowe v. Jackson*, a very short note; the other, an order, made by Lord Alvanley, upon petition, by some slip in the absence of the assignees, who were not parties, and without even inquiring whether they had any objection to it. The property was very small, which perhaps might have had some influence. The Court cannot say what proportion the wife would have settled upon herself, and what upon her children. In *Macaulay v. Philips*,² it was held, that the decree gave no interest to the husband, but it survived to the wife; and Lord Alvanley says, if she died, notwithstanding his proposal, he would have been entitled. That opinion was given by Lord Alvanley *with great deliberation, and takes the distinction [*185] between a settlement approved by the Court and a mere proposal.

LORD CHANCELLOR ELDON.—There are two points upon this demurrer: one of form, the other upon the merits. If the wife has this equity for a provision for herself and her children up to the moment of the completion, it is competent to her to give it to her husband. A great variety of proceedings have occurred, in which the Master has stated, that, with reference to the point of settlement, the party had waived it; and I apprehend, it will be found that she may, between the period of the order and her death, waive the benefit of that order.³ The question then is, if between the date of the order and her death, she does not, by some authoritative proceeding, express an alteration of her mind, whether that order is to stand for the benefit of the children. The two decisions that have been mentioned are strong authorities for that. Let an inquiry be made into the circumstances of those cases; and, as to the latter, whether the assignees of the husband were heard or not.

Mr. *Alexander*, for the plaintiffs, stated the case of *Martin v. Mitchell*, from the Register's book, in which the motion before

¹ 4 Ves. 15.

² See *Lloyd v. Williams*, 1 Madd. 466.

Lord Thurlow, in 1779, was made. In 1777, a decree was made for an account, and that what should be found due to Hannah Fearn should be paid into Court, to her separate account, with the usual direction for a settlement. The sum of 3000*l.* was, by the report, stated to be due, and was carried over. After her death, in 1779, the motion referred to in *Rowe v. Jackson*, to pay that sum to the husband, was made, and refused; and an order was made, directing the husband to go before the Master, and execute the order for a proposal. That proposal was carried into effect, by petition, at the Rolls; and, under another order, in 1803, stating all the proceedings, the children were paid.

It appears from these cases, that the equity of the wife [*436] *does survive to the children; and their only mode of availing themselves of this interest is by supplemental bill. The case of *Macaulay v. Philips* is not applicable. The dictum of Lord Alvanley would have been inaccurate, if there had been any children; but there were no children. It amounts to no more than that the proposal did not sever the joint-tenancy between the husband and wife. If, as your Lordship has observed, the wife can waive her right under the order for the benefit of her children and herself, that cannot affect a case where she has not waived, and is dead.

LORD CHANCELLOR ELDON.—The question is, what is the effect of such an order, as constituting a right in the issue to a provision, if the wife dies without any act done after the date of that order? If this case had been antecedent to the period when the manuscript case to which Mr. *Madocks* alluded was decided, it would have been very difficult, consistently with what the Court does with the wife's property, to say there was such a right as is now asserted, upon a proceeding that went no farther than an order to lay a proposal before the Master. The husband, where he can, is entitled to lay hold of his wife's property, and this Court will not interfere. Previously to a bill, a trustee, who has the wife's property, real or personal, may pay the rents and profits, and may hand over the personal estate to the husband. Lord Alvanley, in *Macaulay v. Philips*, has laid down, that, after a bill filed the trustee cannot exercise his discretion upon that; that the bill makes the Court the trustee, and takes away his right of dealing with the property, as he had it previously. I have heard that otherwise stated in this court, at the bar, at least. But that case is the last; and, I think, contains very wholesome doctrine upon that point. I should have supposed, a decree made in the cause proceeded upon the right or equity in the wife at the filing of the bill; for decrees are only declarations of the Court upon the rights of the parties when they begin to sue. [*437] The wife is entitled to call for a declaration, that she *then had a right to a provision for herself and her children; and yet it is clear, after such a bill filed, she might come into Court and consent to her husband's having the fund entirely

under his dominion. If she does not, the Court, by the decree, orders a proposal to be made for a settlement upon the wife and issue.

It has been truly observed, that this doctrine is a mere creature of the Court, founded altogether in its practice. The case of *Macaulay v. Philips*, proves, what I should have had no doubt upon, that notwithstanding that order for a proposal, if either party died while it rested merely in proposal, that would not affect the right by survivorship as between the husband and wife. There were no children in that case, certainly. It is not unfrequent, where the Master makes his report after a decree, for him to state, that the parties had declined to lay a proposal for a settlement before him. That has occurred since I have sat here ; but, when at the bar, I was frequently concerned in this final arrangement, that notwithstanding such order by the original decree, upon further directions the wife came, consenting that the fund should be taken out of Court and was permitted to do so. If, therefore the issue have a right against the father, it is dependent altogether upon the will of the mother. There is, perhaps, some difficulty in making all the principles of the Court upon this subject consistent with the notion of such right in the children ; but it is not for me to reconcile all these principles, if there is practice sufficient to establish a given course as to that. In *Rowe v. Jackson* (and I can, from my own memory, confirm both accounts of that case), upon an application, where it was necessary to consider whether, the wife never having expressed any change of opinion between the period of the order for a proposal and her death, that order gave the children any right, Mr. Maddocks stated, that it was not according to the practice, after that order, to permit the husband to avail himself of the death of the wife to take the fund, leaving the children unprovided. His authority, always considerable, is in that instance peculiarly to be regarded *as he referred to another case, in which [*438] Lord Thurlow was satisfied that such was the rule, and acted upon it. But it does not rest there ; for in a subsequent case it is clear from the Register's Books that Mr. Mansfield, after the death of the wife, moved that a sum of money should be paid to the husband ; and Lord Thurlow refused that application, upon the ground that the order for a proposal on behalf of the children was an obstacle. That was followed by what Lord Alvanley did upon a petition ; whether regularly or not, will not shake the doctrine, considering what had been done before. In that instance, Lord Alvanley would not deliver out that small sum, little more than 300*l.*, until satisfied that there was some provision for the children.

Taking all this together, however numerous the difficulties upon it, it is too much for me to say, upon the argument of a demurrer, all that has been done in the cases referred to is to go for nothing, because it is difficult to say, ab ante, it should be done, and that I am to set up a different course of practice. I

agree also with Mr. Alexander as to the dictum of Lord Alvanley in *Macaulay v. Philips*, which construction is necessary to make him consistent; and attention being given to the circumstance that there were no children, there is no inconsistency in that case. The principle must be, that the wife obtained a judgment for the children, liable to be waived, if she thought proper; otherwise, to be left standing for their benefit at her death.

Next, as to the form: if the children have acquired a right by the judgment in the former suit, it is subsequent to the institution of the proceeding in that suit; and unless they can apply by petition, under the liberty to apply, I do not see how they can, except by supplemental bill.

The demurrer, therefore, ought to be overruled. If, upon the hearing of the cause, this should turn out to be wrong, it is infinitely better that it should go to the House of Lords upon a full hearing.

Demurrer overruled.

[*439]

*MURRAY v. LORD ELIBANK.

MAY 21, 22. JULY 21, 1806.

REPORTED IS YES. 1.

Right of children to a provision out of the property of their mother, under a decree directing a settlement on her and her children; notwithstanding her death before the report, no act being done by her to waive the equity.

In this cause, the demurrer of the defendant Montolieu having been overruled, answers were put in, and the cause came on to be heard.

Mr. Alexander and Mr. Cooke, for the plaintiffs, relied upon the opinion expressed by the Lord Chancellor upon the demurrer.

Mr. Richards and Mr. W. Agar, for the defendant Montolieu—This is a very important and a new question, which the Lord Chancellor did not profess to decide upon the demurrer. The opinions that have been expressed shew the notion that has prevailed as to the practice, but there is no decision upon it. The order by Lord Alvanley would not have been made if the Court had been aware that the creditors were not parties, the husband and wife having assigned the fund, to secure a debt; and it was delivered out of Court upon the statement that it was very small, the creditors not being parties, and no contest. The cases of *Martin v. Mitchell* and *Rowe v. Jackson* were also upon petition, and no contest. It is true, this equity is the creature of this

Court; it has been held, both here and by Lord Eldon, that it has no analogy to a fine, and it does not arise if the husband gets the property, if it is *not intercepted in the way; but if [*440] the order of the Court is necessary, either upon the bill of the wife, which must now be admitted, or of the husband, the Court will make him do what is just; otherwise, there is no jurisdiction against him, and he cannot be held guilty of a contempt. He may run his life against hers. The Court goes no further than refusing to assist him, unless he will make a provision. The Court does not act upon the interest of the wife; for if so, they would give it to her. The Court has no dominion upon the subject, but exercises a sort of arbitrary authority, there being no interest in her in point of law. The Court cannot compel him to give her an interest, but merely refuses to interfere in his favour, except upon certain terms. There is no doubt that, after a reference directed, as to a provision for the wife and children, she may come the next day, and, by her own act of consent, defeat that provision for her children, though without her consent the Court would not give the fund to her husband; but there is no jurisdiction to prevent her giving it to him. Mr. Justice Buller attempted it, and refused to take the consent; but Lord Thurlow held, that he could not refuse it, and, with great reluctance, gave the money to the husband. The power which the wife has in that way to defeat the reference in favour of the children, shows clearly that the reference is directed upon her account, not theirs.

In the case of *Alexander v. McCulloch*,¹ it was never thought possible to give the property to the wife; but each came from time to time, to get a little; and Lord Thurlow fed the husband occasionally, in order to induce him to make a proposal. But she might have come to give it away to him; and, in fact, they did at last agree, as they did also in *Macaulay v. Philips*.² The protection subsists only as long as the wife chooses. When she is gone, the equity, which is attached to her, and to her only, must be gone also. What interest can the children have against their father? Are they purchasers as against him? He is a purchaser of his wife's choses in action by the act of marriage, completed by the administration. *What right have the children, as against their father, to insist upon a part of [*441] the fortune?

In *Scriven v. Tapley*,³ the Lord Chancellor held this equity personal to the wife, reversing a decree at the Rolls in favour of the children. *Bond v. Symmons*,⁴ also, is an authority that the wife surviving is entitled to the whole; and the consequence is, that by her death the equity is gone, and the children cannot file a bill to bring the money into court. These authorities outweigh

¹ 2 Ves. jun. 192, cited.

² Amb. 609; S. C., 2 Eden, 837.

³ 4 Ves. 15.

⁴ 8 Atk. 20.

the loose dicta upon the petition, and without contest, in favour of this bill; and it stands upon no foundation of principle.

Mr. *Alexander* in reply.—The opinion of Lord Eldon is expressed in favour of this bill. It is supposed that the plaintiffs must contend, that this equity would bind the wife herself, if she chose to relinquish it. But, admitting that, notwithstanding an order for a settlement, if the husband dies, the wife surviving is not bound to make a settlement, can it be said, therefore, the husband is not bound? There is no doubt, the equity is that of the wife; and she may, in any stage, come into court, and relinquish the equity both for herself and her children.

[*Master of the Rolls* (Sir W. Grant).—Down to what time?]

To the time at which the settlement is actually made. It is an equity, in opposition to the husband's legal right, upon which it is imposed as a burthen in favour of herself and those in whose favour she may think fit to apply; and which she may at any period abandon. There is nothing inconsistent in her right to relinquish that claim, which she has on behalf of herself and her children. But after her death the Court will suppose she died with the intention to insist upon it for her children; in whose behalf it shall subsist after her death, unless expressly waived during her life. After the order made upon her application, and not waived, which by the event of her death is now become impossible, the right of the children is vested; the effect of the order being a specific lien upon the particular fund, in respect of [*442] which the husband makes the *application, notwithstanding the general terms of the order.

The MASTER OF THE ROLLS (Sir W. Grant).—This case arises out of the case of *Lady Elibank v. Montolieu*; by the result of which the right of Lady Elibank to maintain a suit for a settlement against her husband and the administrator was established; and it was determined, that the claim which the administrator had, as a creditor of her husband, did not stand in the way of her right.

The question now, Lady Elibank having died before anything was done under the decree, by which the Master was directed to approve a settlement upon her and the children, is, whether the children have a right to the benefit of that decree?

It is contended, on the part of the defendant Montolieu, that the right to demand a settlement is a personal equity, attaching to a married woman, and in no sense the right of the children; for, if it were, the mother could not relinquish it, as it is admitted she may; that, though the children may derive a consequential benefit from having the settlement made upon the mother extended to them, yet, when her right is out of the question, as it is in this instance by her death, there must likewise be an end of theirs. Upon the other side it was contended, that, when a settlement was, by the decree, directed to be made upon the mother and the children, the right of the children is so far fixed,

that the Court will recognize and carry it into effect, notwithstanding her death, provided no act was done by her to waive the benefit of it. It seems to be assumed in the argument, both here and before Lord Eldon, that it was competent to the mother to waive the settlement at any time before it was actually completed; that is, even after a proposal given in by the husband. Lord Hardwicke, however, determined the contrary;¹ stating, that though the wife might give up her interest in the money, if she pleased, yet nobody could consent for the children, which may be. That does not directly apply *to this case; as, I believe, no proposal was laid before the Master in this [*443] case.

With regard to this equitable right which a married woman has in this Court to a provision out of her own fortune, before her husband reduces it into possession, it stands upon the peculiar doctrine of this Court. It is vain to attempt, by general reasoning, to ascertain the extent of that doctrine. We must look to the practice of the Court itself. It is sufficient to say the habit of the Court has always been of itself, and without any application previously made by the married woman, to direct an inquiry, when money has been carried over to her account, whether any settlement has been made; for the money is carried over subject to that inquiry, and the constant habit has been to direct a settlement not upon the wife only, but upon the children also. I am not aware that she has in any case been permitted to say she claims a settlement for herself, but not for her children. She has the option not to have any settlement made; but if a settlement is to be made, it is always directed for the benefit of the wife and the children. When she comes to give up her right to her husband, she is examined whether she wishes for any settlement. If she does not desire any settlement, then the money is paid to her husband. If she desires a settlement, the settlement is upon her and the children.

The question has been made, whether the children have any substantive and independent right to claim a settlement after the death of their mother, if a settlement was not directed during her life? In the case of *Hearle v. Greenbank*,² Lord Hardwicke appears to state that as a doubtful point; and that he conceived there was no case determining that the children have such right. His Lordship seems not to have recollected the case that was before him, *Grosvenor v. Lane*,³ in which he took notice of such a decree, though the question before him was not upon the point.

¹ *Anon*, 2 Ves. 671. See, however, *Lloyd v. Williams*, 1 Madd. 466, in which the opinion of Lord Eldon is recognized and approved of. The equitable right of a married woman stands upon the peculiar doctrine of the Court. When money is carried over to her account, the habit of the Court is, without any previous application by her, to direct an inquiry, whether any settlement has been made: and the constant habit has been to direct a settlement, not upon her only, but upon the children also: her option to waive a settlement not enabling her to have it confined to herself, excluding her children.

² 3 Atk. 695. See *Ib.* page 717.

³ 2 Atk. 180.

That was the case of the second husband, endeavouring to reduce his wife's fortune into possession; and the Court directed a settlement upon the child, the immediate point in the cause before [*444] Lord *Hardwicke turning upon the right of the child absolutely to the whole legacy, in consequence of an appropriation of it by the second husband.

In a subsequent case, *Scriven v. Tapley*,¹ Sir Thomas Clarke, as a matter of course, taking it as the ordinary equity, directed a proposal by the representative for a settlement upon the child, the wife being dead. That part of the decree, it is true was reversed by Lord Northington, but the opinion, that children have that equity in their own right, and independent of any claim through the mother, prevailed so much, that notwithstanding that reversal, in a year and a half afterwards, Sir Thomas Sewell, in *Cockel v. Phips*,² made precisely the same decree. Every one knows how intimately Sir Thomas Sewell was acquainted with the practice of the Court.

There is, therefore, a great deal of authority in opposition to that decision by Lord Northington, in *Scriven v. Tapley*, all weighing strongly in favour of the right of the children claiming under a decree in favour of their mother; for, if their right to come with an original demand for a settlement upon them, their mother having died without demanding any settlement, is established, a fortiori, if she has claimed, and the Court has directed a settlement the children must be entitled. As to that there are very few cases, but all are one way. The doctrine, as far as there is any memorial of it, is uniform; and it is upon the uniform habitual doctrine of the Court that you are least likely to find cases; and in the cases that have occurred, the Court has interposed, not upon any controversy between the parties, but upon its own doctrine. In *Martin v. Mitchell*, the husband claimed the fund, and the Court would not permit him to take it, but directed the former order, for a settlement upon the wife, to be prosecuted. In *Rowe v. Jackson* a similar application appears to have produced a similar refusal; and both these cases were before Lord Thurlow. No ground is laid upon which I should be induced to depart from the established doctrine. We can look nowhere but to the practice of the Court for the extent of that [*445] doctrine. Here we find it. *There is no instance in which the husband has succeeded in getting money out of court without making a provision for the children.

These plaintiffs, therefore, are clearly entitled upon their supplemental bill. It is not necessary to determine whether they could have got at it by any other mode.

¹ Amb. 509; 2 Eden, 337.

² 1 Dick. 391. See, however, *Lloyd v. Williams*, 1 Madd. 464, where it appears that the point said to have been decided by Lord Northington in *Scriven v. Tapley*, did not arise.

By common law, (unaffected by recent legislation,) on marriage, the husband became entitled to receive the rents of the wife's real estates during their joint lives, and he became absolutely entitled to all her chattels personal in possession and to her choses in action, as debts by obligation, contract, or otherwise, if he reduced them into possession; or if he did not, as administrator of his wife, if he survived her; and he became also entitled to her chattels real, with full power to alien them, though if he died before his wife, without having reduced into possession her choses in action, or without having aliened her chattels real, they would survive to the wife. See *Gilb. Ten.* 108; *Co. Litt.* 67 a., 300 a., 351 b., 351; 1 *Roll. Ab.* 342, pl. 1; *Co. Litt.* 185 b.; *Fleet v. Perrins*, 3 L. R. Q. B. 536, 4 L. R. Q. B. 500.

The husband acquired this interest in the property of his wife, in consideration of the obligation which, upon marriage, he contracted, of maintaining her and his children by her; but the common law was defective, inasmuch as it possessed no means of ensuring the performance of the duty imposed upon the husband, since in many cases he might have it in his power to alien all the property to which he was entitled *jure mariti*, or upon his becoming bankrupt or insolvent it would vest in his assignees for the benefit of his creditors, and thus his wife, however great may have been her fortune, might, with her children, be left utterly destitute. Courts of equity have, from a very early period, endeavoured to remedy this deficiency in the common law, by giving to the wife, in certain cases, a right to a provision out of her own property; this right is called her equity to a settlement. See the observations of Lord Hardwicke in *Jewson v. Moulson*, 2 Atk. 417; and of Lord Cottenham in *Sturgis v. Champneys*, 5 My. & Cr. 101, 105.

The jurisdiction to compel the husband, or those claiming under him, to make a settlement upon the wife, was first assumed in cases where it was necessary for them to apply to the Court for assistance in order to obtain possession of the property of the wife; which assistance the Court, acting upon the maxim, *that he *who seeks equity must do equity*, withheld until an adequate settlement was [*446] made upon the wife: *Bosvil v. Brander*, 1 P. Wms. 459. In consequence of this origin of the jurisdiction, it was thought, that the equity of a wife to a settlement was confined to those cases in which the husband, or those claiming under him, were plaintiffs. See *Bosvil v. Brander*, 1 P. Wms. 460. However, since the decision of *Lady Elibank v. Montolieu*, the wife has been permitted actively to assert her equity as a plaintiff: *Sturgis v. Champneys*, 5 My. & Cr. 105; *Eedes v. Eedes*, 11 Sim. 569; *Hanson v. Keating*, 4 Hare, 6; and see *Osborn v. Morgan*, 9 Hare, 434; *Newenham v. Pemberton*, 1 De G. & Sm. 644, in which case the Court refused to take a bill off the file, although it was filed by the infant plaintiff in her maiden name by her next friend, whereas she was in fact clandestinely married, and the Court directed a settle-

ment, although the bill did not expressly pray to that effect. See, however, the remarks on this case *In re Potter*, 7 L. R. Eq. 487.

The necessity for a married woman to assert her equity to a settlement has been much diminished by the Married Woman's Property Act, 1870, 33 & 34 Vict. c. 93 (more fully treated of in the next note), according to which the earnings of a married woman, after the passing of the Act (sect. 1), personal property coming to her under an intestacy, or any sum of money not exceeding 200*l.* under a deed or will (subject to the trusts of any settlement affecting the same), (sect. 7,) and the rents and profits of freehold, copyhold, or customary hold property descending upon any woman married after the passing of this Act (sect. 8), will belong to her to her separate use. Deposits and investments also may be made (sects. 2, 3, 4, 5), and sums assured (sect. 10) to a married woman's separate use.

The Court of Bankruptcy has, it seems, jurisdiction to order a settlement to be made upon the wife of a bankrupt, insisting upon her equity to a settlement: *Ex parte Thompson*, 1 Deac. 90; *Ex parte Norton*, 8 De G. Mac. & G. 258; *Ex parte Coysegame*, 1 Atk. 192.

As against whom the equity of a wife to a settlement is binding.—The equity of a wife to a settlement is binding not only upon her husband, but also upon his assignees in bankruptcy, under the Insolvent Debtors' Act, or under a general assignment for the payment of his debts: *Jewson v. Moulson*, 2 Atk. 420; *Burden v. Dean*, 2 Ves. jun. 607; *Pryor v. Hill*, 4 Bro. C. C. 138, and notes by Belt; *Oswell v. Probert*, 2 Ves. jun. 680; *Sturgis v. Champneys*, 5 My. & Cr. 97. It was, however, at one time doubted whether it was binding upon the assignee of the husband for valuable consideration; *but Lord [*447] Alvanley, in the case of *Macaulay v. Philips*, 4 Ves. 19, after fully considering the authorities, stated his opinion to be in favour of the claims of the wife. "Many cases," said his Lordship, "upon this point have been before me, which have put me under the necessity of considering very much the rights of the wife, and I am clearly of opinion the doubt respecting the assignment of the husband for a valuable consideration of the wife's equitable interest, was not well founded (with the single exception, perhaps, of a trust of a term of years of land), upon which, perhaps, there may be some doubt; but subject to that, I am clearly of opinion that an assignment for a valuable consideration will not bar the equity of the wife, and it would be strange if it did, since by the determinations in the courts of law, with regard to an action brought against executors by the husband for a legacy due to his wife, it is determined that an action does not lie; and the reason given is, that it would totally defeat the wife's equity. It would be whimsical, then, that the assignment by the husband for valuable consideration should put the assignee in equity in a better situation than the husband himself is in at law. The guard of this Court upon the wife's interest

would be very singular if the husband, not being entitled at law, might assign it for a valuable consideration to another person, who would be entitled in equity. I am clearly of opinion it was only a doubt, and it never was decided, that the husband could, by such assignment, or any other means, deprive her of her equity." See also *Scott v. Spashett*, 3 Mac. & G. 599; *Marshall v. Gibbins*, 4 Ir. Ch. Rep. 276.

It will be seen hereafter that the doubt thrown out by Lord Alvanley, as to whether a wife is entitled to a settlement out of her trust term, is unfounded; the assignee, however, for value of the husband has in other cases (which will be noticed hereafter), been considered to stand in a more favorable position than either the husband or his general assignees.

Although an executor or administrator has a right to set off a debt due to the estate from a husband, against any legacy or share under the intestacy to which his wife is entitled (*Hall v. Hill*, 1 Dru. & War. 109), the wife's equity to a settlement is paramount to the right of set off, which cannot be enforced to the prejudice of the wife's equity (if any) to a settlement. If, for instance, the wife is entitled to have the whole fund settled upon her, then the right of set off or retainer will be completely barred; if she has only a right to have part of the fund settled, the right of retainer or set-off will be to that extent barred. See *Carr v. Taylor*, 10 Ves. 574; *Ex parte Blagden*, 2 *Rose, [*448] 294; *Ex parte O'Ferrall*, 1 G. & J. 347; *McMahon v. Bur-* [448] *chell*, 3 Hare, 97, 5 Hare, 325; *Reeve v. Rocher*, 1 De G. & Sm. 626; *Lee v. Egremont*, 5 De G. & Sm. 348; *M'Cormick v. Garnett*, 2 Sm. & Giff. 37. It is presumed that Lord Loughborough, when he observed in the principal case (page 340, *ante*), "That if the plaintiff had any equity against her husband with regard to the money, that equity would clearly bar any right of retainer that the administrator could set up," merely meant, that the bar to the right of retainer was co-extensive with the wife's equity.

Out of what property the wife can claim her equity to a settlement.]
—Where the property of the wife is equitable, and consequently not recoverable at law, it is clear that the husband or his assignees, will only obtain it upon the terms of making a settlement upon the wife and her children, if she require one to be made: *Milner v. Colmer*, 2 P. Wms. 639; and a legacy is not deprived of its equitable character by being charged on land, with power of entry and receipt of the rents and profits; *Duncombe v. Greenacre*, 28 Beav. 472, 2 De G. F. & Jo. 509.

And where an equitable estate in fee descended on a married woman, the Court, by virtue of her equity to a settlement, has settled the estate on her during her life, but has refused to interfere with the possible estate by curtesy of the husband: *Smith v. Matthews*, 3 De G. F. & Jo. 139.

And even where the property though in its nature legal, becomes, from collateral circumstances, the subject of a suit in equity, it appears that the wife's equity to a settlement will attach. This is clearly laid down in the important case of *Sturgis v. Champneys*, 5 My. & Cr. 97, where Lord Cottenham, in a most elaborate judgment, considers all the authorities upon the subject. In that case the *provisional assignee* of Sir Thomas Champneys, an insolvent debtor, whose wife, Lady Champneys, was entitled *for her life* to real property, of which the legal estate was outstanding in mortgagees, was obliged to file a bill to make his title (subject to the incumbrances) effectual. Upon Lady Champneys claiming her equity to a settlement, it was contended that her life-interest in the estates could not be considered as an equitable interest merely on the ground that the legal estate was outstanding, and that the Court had never made a provision for a wife out of such an interest as the husband in that case had, and that it was not established that the wife's equity extended to the rents of real estate. Lord Cottenham, however, reversing the decision of Sir L. Shadwell, V. C. (4 Sim. 82), held the wife entitled to a settlement out of the rents of her life-estate. "If," said his *Lordship, "the authorities support [*449] Lady Champney's equity as a condition which this Court imposes as the price of the assistance which the assignee asks of this Court, the nature of the estate of the wife in the subject matter in contest does not seem to be important.

"Upon a careful examination of the authorities, I do not find the time at which the Court did not exercise this jurisdiction in favour of the wife. In *Bosvil v. Brander*, 1 P. Wms. 458, in which the wife was mortgagee in fee, and the decision was against her, she being plaintiff (and then a widow), the Master of the Rolls, recognizing the rule, says that 'it might have been a matter of different consideration if the assignee had been plaintiff in equity, and desired the aid thereof to strip the unfortunate widow of all that she had in the world, towards the doing of which equity would hardly have lent any assistance.'

"Many cases followed, in which the principle was recognized; and in *Burdon v. Dean*, 2 Ves. jun. 607, the assignees of a bankrupt husband filed a bill, praying that they might be entitled, during the joint lives of the bankrupt and his wife, to the income of certain freehold, leasehold, and personal estates, to which the wife was entitled for life; upon which the Master of the Rolls said, 'I have no objection to what they can get at law, but if they come into this court, I will not extend the arm of the Court to give them any other part of her property, without a consideration for it; therefore let it be referred to the Master, that they may lay proposals before him.' It was said that the order in this case was by consent. That I think immaterial, as it does not affect the observation of the Master of the Rolls, for which alone the case is of any value.

"In *Oswell v. Probert*, 2 Ves. jun. 680, the husband having become, bankrupt, Lord Rosslyn said, 'Where persons claiming in right of the husband are obliged to come into an equitable jurisdiction, to obtain the benefit of any part of the property, the destination of which is for the enjoyment of the husband and wife, the Court will not apply it to the use of the husband, leaving the wife to starve. Whatever the husband takes in right of his wife, is, in itself, a provision for the maintenance of both;' and in *Ball v. Montgomery*, 4 Bro. C. C. 338, the equity of the wife was put upon the same ground. In *Brown v. Clark*, 3 Ves. 166, Lord Alvanley said, the assignees of the husband 'must make a provision for the wife before they can call it out of this Court.' In *Freeman v. Parsley*, 3 Ves. 421, Lord Rosslyn directed a provision for the wife against the assignees of her husband upon the same principle. In *Mitford v. Mitford*, 9 Ves. 87, Sir W. *Grant said, [*450] 'It is upon the ground that the assignees want its assistance to reduce the property into possession, that this Court imposes upon them the condition on which alone it would have assisted the husband to obtain possession.' In *Wright v. Morley*, 11 Ves. 12, Sir W. Grant said, 'In *Pryor v. Hill*, 4 Bro. C. C. 139, it was contended that the equity of the wife did not extend to the case of a life-interest upon the principle that the husband becomes absolute purchaser of that upon the marriage, in consequence of the obligation to maintain his wife thereby contracted. That argument, however, did not prevail. The life-interest passes to the assignees, subject to the ordinary equity for a settlement.' In *Elliott v. Cordell*, 5 Madd. 149, Sir J. Leach, though he thought that the title of a particular assignee of the property of the wife then in dispute was good against her claim to maintenance out of it, yet said, that if the husband had been bankrupt, the Court would have fastened upon his assignee the obligation of maintaining the wife out of any property of hers; which must be understood to assume the case of the assignee's applying for the assistance of this Court to obtain such property.

"From these authorities, and many others which recognise the same principle, it appears that the equity which this Court administers in securing a provision and maintenance for the wife, is founded upon the well-known rule of compelling a party *who seeks equity to do equity*; and it is not possible to conceive a case more strongly calling for the application of that rule. The common law gives to the husband the enjoyment of the life estate of the wife, upon the ground that he is liable to maintain her, and makes no provision for the event of his failing or becoming unable to perform that duty. If the life estate be attainable by the husband or his assignee at law, the severity of this law must prevail; but if it cannot be reached otherwise than by the interposition of this Court, equity, though it follows the law, and therefore gives to the husband or his assignee the life estate of the wife,

yet it withholds its assistance for that purpose, until it has secured to the wife the means of subsistence; it refuses to hand over to the assignee of the husband, to the exclusion of the wife, the income of the property which the law intended for the maintenance of both. Upon the same principle, the ordinary interposition of this Court, in compelling a settlement of the property of married women, was originally founded, although the wife is permitted actively to assert her equity as a plaintiff; and if such be the principle, what difference can it make, where the assignees of the husband are applying to this Court [*451] *for its assistance to obtain the property, that the estate of the wife is not a trust, but that the recovery at law is prevented only by the existence of a prior legal trust estate? It happens, however, that in *Oswell v. Probert*, before referred to, the estate of the wife was the same as in this case. The testator had devised his estate to trustees in fee, upon trust to pay certain annuities and legacies, and the trustees were directed to stand seised to the use of his daughter, the wife of the bankrupt, for her life. The estate had, indeed, been sold to pay the prior charges; but it being evident that the trust was subsisting, and the legal estate in the trustee, the Court said, that the assignees were in the place of the husband not maintaining the wife, and declared that a provision was to be made for her." See *Bonfield v. Hassall*, 11 W. R. (M. R.) 297; *Barnes v. Robinson*, 11 W. R. (V. C. S.), 276; but see *Gleaves v. Paine*, 1 De G. Jo. & Sm. 87, where Lord Wesbury, C., said that, although the decision in *Sturgis v. Champneys*, being a decision of the Lord Chancellor, must be followed, yet he was not disposed to extend it any further than the actual decision went, and that, as in that case the assignees were plaintiffs, it would extend the rule very much to recognise the doctrine that a wife might come here asking a settlement of real estate belonging to the husband against the husband's assignee, which the assignee could render available without resorting to the Court of Chancery.

Whatever may be the right of a married woman to have a provision made for her out of the income of an estate of which she is equitable tenant in tail, it is not according to the course of the Court, or indeed in its power, to order a settlement to be made of the estate or land to be purchased with money of which the married woman is equitable tenant in tail. For it is clear that the equity for a settlement attaches upon what the husband takes in right of the wife, and not upon what the wife takes in her own right, and the estate tail being in the wife, the Court has no power to order a settlement of it to be made, or to render such a settlement, if made, binding and effectual against the wife: *Life Association of Scotland v. Siddal*, 3 De G. F. & Jo. 271, 276.

Where copyhold property descended in fee upon a married woman, subject to a covenant entered into by a former owner upon his marriage to surrender it to certain uses, under which, had the surrender been

made, the married woman would have been legal tenant in tail, it was held by the Lord Justices that she had no equity to a settlement out of property so circumstanced: *Re Cumming*, 2 De G. F. & Jo. 376.

In *Freeman v. Farlie*, 11 Jur. *447, where a sum of money, [*452] being rent of real estate (not, as it seems, equitable) to which a husband was entitled jure mariti, was paid into court by an agent, Sir L. Shadwell, V. C., upon the authority of *Sturgis v. Champneys*, held that the assignee of the husband (who was insolvent) was not entitled to it, without a settlement upon the wife; and see *Life Association of Scotland v. Siddal*, 3 De G. F. & Jo. 271.

Notwithstanding the doubt thrown out by Lord Alvanley in *Macaulay v. Philips*, 4 Ves. 19, it is now clearly settled, overruling what is supposed to have been decided in *Sir Edward Turner's Case* (1 Ch. Cas. 307, 1 Vern. 7, see *Sanders v. Page*, 3 Ch. Rep. 223), that a wife will be entitled to a settlement out of her trust term in land, not only as against her husband, but also against his assignee for valuable consideration. Thus, in *Hanson v. Keating*, 4 Hare, 1, where a husband and wife assigned, by way of mortgage, the equitable interest of the husband in right of his wife in a term of years, the mortgagee filed his bill against the husband and wife, and the trustee of the legal estate, for a foreclosure and assignment of the term; it was held by Sir J. Wigram, V. C., upon the authority of *Sturgis v. Champneys*, although contrary to his own opinion independent of that case, that the wife was entitled to a provision for her life, by way of settlement, out of the mortgaged premises. "I am clear," observed his Honor, "that I am not bound in this case, to impose upon the plaintiff the terms required by the defendant, only because he is plaintiff (for that was the argument at the bar). The question is, what are the equitable rights of the parties, independently of their relative positions on the record? *Sir Edward Turner's Case*, 1 Vern. 7, if it be law, answers this question. Now it is true, that some judges have thought the resolutions in that case questionable; but it is equally true, that they have considered it as binding upon all courts until the House of Lords should alter its own resolutions: *Pitt v. Hunt*, 1 Vern. 18; *Jewson v. Moulson*, 2 Atk. 417; and unless I am altogether under a mistake, *Sir Edward Turner's Case*, has always been, and is at this day, considered law by conveyancers, and is acted upon accordingly. And the more strong has been the dissent from the resolutions in that case, the more do the judges who express that dissent affirm the authority of the case by following it. I believe the understanding of the profession, prior to the decision of *Sturgis v. Champneys*, to have been that *Sir Edward Turner's Case* was in accordance with the principles of the Court: and I advert to that understanding the more, not only because the Vice-Chancellor of England concurs in it, but because I know the learned editor *of Mr. Roper's book [*453] on the law of Husband and Wife always lamented the decision

in *Sturgis v. Champneys*, as having, in his opinion, unsettled the law. In some cases of mere personalty there is no doubt of the wife's equity; but, prior to *Sturgis v. Champneys*, the opinion of the profession had, I believe, become settled, that estates in land were not subject to the same equity, upon the broad and important principle of preserving a strict analogy between legal and equitable estates in land. In the case of *Burdon v. Dean*, 2 Ves. jun. 607, the order was made by consent; and Lord Cottenham notices that circumstance in *Sturgis v. Champneys*. I shall not, however, decide this case without attentively reading *Sturgis v. Champneys* in private."

On a subsequent day, his Honor, deciding in favour of the wife, observed, "At the close of the argument in this case, I stated what my understanding of the law was; and I reserved to myself the duty only of examining the case of *Sturgis v. Champneys*, to determine whether I could act in this case upon my individual opinion as to the law, without directly impugning the plain tenor of Lord Cottenham's judgment in that case. My opinion is, that I cannot do so; and, therefore, in deference to that judgment, I shall follow it, although, if that case were out of the way, I should probably have decided otherwise. There would be no difficulty in distinguishing the facts of this case from those in *Sturgis v. Champneys*; but the reasoning in that case would remain, and I cannot disregard it."

The estate of a feme covert tenant in tail in possession, subject to a term to secure a jointure, has been held to be equitable during the continuance of the term, for the purpose of entitling her to a settlement on a bill filed by her. See *Wortham v. Pemberton*, 1 De G. & Sm. 644. "Although," said Sir J. L. Knight Bruce, V. C., in that case, "the plaintiff and her husband, or he in her right, may have the immediate legal freehold, there is a legal title which prevents the enjoyment except by means of a Court of equity, and renders the title to the rents equitable so long as the term lasts; and it appears to me that the plaintiff is entitled to a settlement out of the rents during the joint lives of herself or the husband, or until the determination of the term; the remaining question being, whether if the term shall by the clause of cessor, determine during the joint lives, the settlement can endure beyond that period." His Honor heard the plaintiff's counsel in reply to this question, and held that the settlement could not be made beyond the jointure term.

Although the Court might allow the wife the income of her property, it by no means follows, when the property out of which *she [454] claims a settlement is in the hands of a mortgagee, that he will be allowed by the Court, as against the assignees of the husband, what he may have paid to the wife, out of the income of the property. Thus, in *Clark v. Cook* (3 De G. & Sm. 333), a husband and wife, by deed acknowledged, demised freeholds of the wife to a mortgagee by way of

trust, the trusts being to apply the rents and profits in payment of certain premiums of insurance, and of the interest on the mortgage debt, and then in reduction of the principal, until it should be paid off. The husband took the benefit of the Insolvent Debtor's Act. It was held by Sir J. L. Knight Bruce, V. C., in a suit for redemption, instituted by the assignee of the husband against the mortgagee, that the latter was chargeable with the surplus rents which he allowed to the insolvent's wife for her maintenance. "I cannot help suspecting," said his Honor, "that the wife might have had all that has been paid to her if a proper application had been made to the Court. It is a hard and peculiar case, and there must be no costs on either side."

Where, however, a person entitled, *jure mariti*, to the legal interest in leaseholds, mortgages them, the wife has no equity to a settlement thereout, as against the mortgagee seeking foreclosure or sale (*Hatchell v. Eggleston*, 1 Ir. Ch. Rep. 215), but if the proviso for redemption in such a case is on the repayment of the sum advanced, by the husband (who has become insolvent), and his wife, the power to redeem must be given to her as well as the insolvent's assignee; *Hill v. Edmonds*, 5 De G. & Sm. 603.

Although it was once doubtful, it seems to be now fully established, that a wife is entitled to a settlement out of a *life interest* in equitable property to which her husband is entitled in her right, as against his assignees, upon his becoming bankrupt or insolvent. Thus, in *Lumb v. Milnes*, 5 Ves. 517, a wife having a life interest in the dividends of a fund, was held entitled to a settlement as against the assignees of her husband, who was a bankrupt. The same was held, also, in *Brown v. Clark*, 3 Ves. 166; *Jacobs v. Amyatt*, 1 Madd. 376, n.; and *Squires v. Ashford*, 23 Beav. 132; and in *Sturgis v. Champneys*, 5 My. & Cr. 97, which has been already given at considerable length, Lord Cottenham held, that the wife was entitled to a settlement out of the rents of lands devised to her for life; see also *Vaughan v. Buck*, 1 Sim. N. S. 284; *Koeber v. Sturgis*, 22 Beav. 588.

The wife is also entitled to a settlement or maintenance out of her equitable life interest when she is deserted by her husband. See *Gilchrist v. Cator*, 1 De Gex & Sm. 188, and cases cited *post* p. 475, 476.

It has, however, been held by *Sir L. Shadwell, V. C., that [*455] the wife is not entitled to a settlement out of a life interest when she is living with and is maintained by her husband, who is neither bankrupt nor insolvent. Thus, in *Vaughan v. Buck*, 13 Sim. 404, a married woman, having a life interest in a fund in court, presented a petition, praying that a portion of the income, and of the arrears of it, might be settled to her separate use. It seems she was living with her husband and was maintained by him; but as she alleged, in a manner very inadequate to her fortune, as he was in embarrassed circumstances, and had no property of his own, except his

wife's income. Sir L. Shadwell, V. C., said, that he could not interfere with the right of the husband to receive his wife's income. They were living together, and he was maintaining her as well as he could.

Nor is the wife, it seems, entitled to a settlement out of property in which she has an equitable *life interest*, as against a person to whom her husband has *assigned it for value*, previous to his insolvency or his desertion of her. Thus, in *Elliott v. Cordell*, 5 Madd. 149, the dividends of 9000*l.*, Three per Cents., were given to a married woman for her life, with a bequest over. The husband and wife joined in a sale of this life interest, and the husband afterwards became a bankrupt. A bill being filed by the wife against the purchaser, insisting upon a provision, Sir John Leach, V. C., held, that she was not entitled to one. "I find," observed his Honor, "no authority for the equity claimed by the wife as against the *particular assignee*, in the case of an interest given to the wife for her life; and it does not follow, as a corollary or consequence, from any established doctrine of the Court. Where an *absolute* equitable interest is given to the wife, the Court will not permit the husband to possess it, without making a provision for the wife, or her express consent; and all who claim under the husband must take his interest, subject to the same equity. But, where an equitable interest is given to the wife, *for her life only*, this Court does permit the husband to enjoy it without the consent of the wife, and without making any provision for her. It is true, that if the husband desert his wife, and fail to perform the obligation of maintaining her, which is the condition upon which the law gives him her property, this court will apply any equitable interest which he retains for the life of the wife, either wholly or in part, for the maintenance of the wife; and, if the husband becomes bankrupt, or takes the benefit of an insolvent debtor's act, this court will fasten the same obligation of maintaining the wife out of the property of this description which devolves by act of law [*456] upon the general assignee; *for, when the title of such assignee vests, the incapacity of the husband to maintain the wife has already raised this equity for the wife; but the same principle does not necessarily apply to a *particular assignee for a valuable consideration*, who purchased this interest when the husband was maintaining the wife, and before circumstances had raised any present equity in this property for the wife, whatever may be the force of general reasoning upon it. If, however, I considered it to be useful, that the same rule should be applied to the particular assignee, as to the general assignee, which may be doubted, by declaring this rule in the absence of all direct authority, and of all authority leading necessarily to the same conclusion, I fear that I should not be administering the actual law of this court, but I should be making a new law, and I cannot venture to assume such a jurisdiction."

Again, in *Stanton v. Hall*, 2 Russ. & My. 175, lands were devised to

trustees upon trust to pay the rents and profits to J. H. for life ; but, if he should attempt to assign the same, or should commit an act of bankruptcy, or become insolvent, then upon trust to pay thereout to the wife of J. H. an annuity of 100*l.* during his life, and, after his decease an annuity of 30*l.* during her widowhood, and upon certain other trusts for the children of the marriage. It was held by Lord Brougham, on the authority of *Elliott v. Cordell*, that the annuity of 100*l.* not being for the separate use of the wife, passed by the husband's assignment to a purchaser for value, and that, as against such purchaser, the wife had no equity for a settlement out of the annuity.

The case of *Vaughan v. Buck*, has, indeed, been disapproved of by Lord Langdale, M. R., in *Wilkinson v. Charlesworth* and *Marsack v. Lyster* (reported together, 10 Beav. 324). In the latter case, the personal representative of a man who died, leaving his wife surviving him, claimed to be entitled to the income of her life estate in certain funds which accrued due in his lifetime ; in the former case, a cestui que trust, under an assignment made by the husband, claimed to be entitled to the interest which accrued due in his lifetime upon the portion or portions to which he was entitled in right of his wife. It was argued, that if the husband maintained his wife, he acquired an independent right to her income accrued due in his lifetime, and that any arrears passed to his legal personal representative or assignee, in opposition to the right of his wife. His Lordship, however, said, that the sums of money claimed by the cestui que trust, under the husband's assignment, were choses in action of the wife, not possessed or reduced into possession by the husband when he died, and he was, therefore, of opinion, that the wife became absolutely entitled to them by survivorship. "I have read," observed his Lordship, "the [*457] papers with which I have been supplied, in the case of *Vaughan v. Buck* (which is reported in 13 Sim. 404), and also a copy of the order which was made ; and if the order was right, it does seem to be an authority for the proposition stated and relied on in the argument, that whilst the husband and wife are both living, the husband maintaining the wife is absolutely entitled to the whole of her income, in opposition to her claim to a settlement out of her life estate.

"As the case occurred during the lives of both husband and wife, it does not govern the point which I have now to consider ; and I should have wished to abstain from expressing any opinion upon it ; but considering how constant the practice of the Court has been, and how frequently the question may be raised, I feel it my duty to say, that notwithstanding the case of *Vaughn v. Buck*, I must adhere to the rule which I consider to be established in such cases." See also *Bond v. Simmons*, 3 Atk. 20.

In the recent case, however, of *Tidd v. Lister*, 10 Hare, 140, it was held by Sir George Turner, V. C., that a married woman whose husband

did not maintain her, was not entitled, as against a *particular assignee* of the husband, to a settlement, or maintenance out of the income of the real and personal estate to which she was entitled in equity *for her life*. After referring to *Wright v. Morley*, 11 Ves. 12, and to the cases of *Elliott v. Cordell* and *Stanton v. Hall*, decisions against the right of the wife, his Honor observed, "It was strongly argued in this case. as it was in *Elliott v. Cordell*, that there could be no distinction between the cases in which the wife took a life interest only, and those in which she took an absolute interest, in which latter cases her right to a settlement was fully established against the assignee of her husband for valuable consideration; and that there could be no distinction between the particular assignee for value of the husband, and his general assignee in bankruptcy or insolvency: but there are distinctions between these cases which cannot be disregarded.

"In the cases where the wife takes an absolute interest, the provision is for her and her children. She cannot claim it for herself alone. In the cases where the wife takes a life interest, the provision is for her separate benefit, independently of the children, a distinction pointed out by Sir William Grant, in *Wright v. Morley*. Again, in the cases where the wife takes an absolute interest, her right to a provision for herself and her children is independent of the acts and conduct of her husband; in the case where she takes a life interest only, her right to a provision for herself arises from the *non-fulfilment by him of his [*458] obligations, and is wholly dependent upon his acts and conduct. In the cases, too, where the wife takes an absolute interest, the purchaser takes subject to the well-known and settled equity; but where the wife takes for life only, the equity by which it is said the purchaser must be bound may not exist at the time of his purchase, and depending as it does on the conduct of the husband, may never come into existence: and in this respect, also, there is a great distinction between the particular assignee for value, and the general assignee; for in the case of the general assignee, the very bankruptcy or insolvency on which his title is founded creates the right against him. Considering the question, without reference to the authorities, it must, I conceive, resolve itself into this point: Ought a Court of equity in these cases, against purchasers for value, to follow the law which gives to the husband the power of dealing with the income of his wife's property, or ought it to put in force its ordinary rule, that "he who comes into equity must do equity?" the rule on which, as I believe, both the rights of married women to provisions for their maintenance and their rights to settlements are founded. In determining this point, the inconveniences which would ensue from the Court's acting upon the rule to which I have referred, must not, I think, be thrown out of view. Purchasers would become involved in inquiries into the relation between husband and wife, the extent of their other property, and their other means of

maintenance; and the life interest of married women would become incapable of being dealt with, whatever might be the exigencies of the case. Looking to these consequences, and to the distinctions which I have pointed out, and not of course intending the observations which I have made to apply to a case of fraudulent alienation for the purpose of defeating the claims of the wife, I must confess myself unable to find any clear principle on which I can dissent from the decisions to which I have referred. . . . Much reliance was placed on the observations of Lord Langdale in *Wilkinson v. Charlesworth*; but that was a question between the representative of the husband and the wife surviving; and Lord Langdale's observations seem to have been directed against what had fallen from the late Vice-Chancellor of England in *Vaughan v. Buck*, 13 Sim. 404, as having indicated a doubt whether the wife could in any case be entitled to a provision for maintenance out of her life interest. His Lordship could not, I think, have intended to say, that in every case, and as against every person, she would be so entitled; for in *Wright v. Morley*, 11 Ves. 17, to which he refers, Sir William Grant puts the wife's right to a provision on the absence of the husband, and his *having left her unprovided for, and directed an inquiry as to these points before he could make the order in favour of the [*459] wife. Indeed, I can find no case in which a wife has come to the Court for such a provision except under special circumstances; and certainly no case in which she has succeeded in obtaining it against an assignee for value of her husband." This decision was on appeal affirmed by Lord Cranworth, C., who, with reference to the distinction in principle supposed to rest between the mode of dealing with the purchaser of a wife's life interest, and the purchaser of her absolute interest said, "that they are altogether satisfactory to my mind, I am not prepared to say; at the same time they are certainly not without weight, and considering the authorities are all one way, I think it would be very inexpedient now to attempt to disturb them." See 3 De G. Mac. & G. 857, 870; see also *Durham v. Crackles*, 11 W. R. (V. C. W.), 138; *Re Duffy's Trust*, 28 Beav. 386.

With regard to *Elliott v. Cordell*, it is clear, since the decision of *Siffe v. Everett*, 1 My. & Cr. 37, that the assignment of a life interest of a married woman in a fund not settled to her separate use, could not, unless it came within the provisions of Malins's Act, 20 & 21 Vict. c. 57, in any event, be supported beyond the period of the joint lives of the husband and wife. *Stanton v. Hall*, it will be observed, differed from *Elliott v. Cordell*, inasmuch as the interest of the wife was determinable upon the death of her husband. See *In re Godfrey's Trusts*, 1. R. Eq. 531.

And the husband's assignment for value, when maintaining his wife, of income to which he becomes entitled in her right, will be effectual to deprive her of her equity to a settlement as against the assignee for

value, though the interest of the wife at the time of the assignment was reversionary: *Life Association of Scotland v. Siddal*, 3 De G. F. & Jo. 271, 276, 277. *In re Carr's Trusts*, 12 L. R. Eq. 609.

A wife is entitled to a settlement out of property to which she becomes entitled before, as well as out of what she becomes entitled to after marriage: *Barrow v. Barrow*, 18 Beav. 529.

The Court, however, cannot order a settlement to be made of the reversionary personal property of a married woman. The reason for this is, that the right to the settlement, is an obligation which the Court fastens, not upon the property, but upon the right to receive it, and if the right attaches at all, it must attach with all its incidents, one of which is, that the wife waiving it, must waive it by her consent in Court, which she cannot do in the case of reversionary personal property; *Osborn v. Morgan*, 9 Hare, 432, 434; the question, as to whether a wife is entitled to a settlement can only be decided *when the [*460] reversionary property falls into possession; *Ib.* and see *Taylor v. Austen*, 1 Drew. 459, 464; but see now 20 & 21 Vict. c. 57.

Rights of the children.—Whenever a woman insists upon her equity to a settlement, it will always be extended to her children, and a reference will, as in *Lady Elibank v. Montolieu*, be directed to ascertain what is a proper settlement to be made upon her and her children: *Johnson v. Johnson*, 1 J. & W. 472; *Re Grant*, 14 W. R. (V. C. S.), 191.

The equity to a settlement, however, is strictly personal to the wife. If, therefore, she dies before asserting her right, her children cannot insist upon a settlement. Thus, in *Scriven v. Tapley*, 2 Eden, 337, where a man after the death of his wife, leaving a daughter, filed a bill to obtain the payment of 300*l.*, to which his wife was entitled, Lord Northington, reversing the decision of Sir Thomas Clarke, M. R., held that the daughter had no equity to a settlement out of it. "The equity of compelling settlements," observed his Lordship, "first arose upon the husband's coming to this court for assistance. It is *personal to the wife*, and, if carried further, would be attended with ill-consequences to creditors. There is no case where the Court has refused assistance to the husband, after the death of the wife, upon the terms of his making a provision for the children." Sir William Grant, it will be observed, when *Murray v. Lord Elibank* came before him, cited the decision of Sir Thomas Sewell, M. R., in *Cockel v. Phipps*, 1 Dick. 391, in support of the decision of Sir Thomas Clarke, which he seems to have preferred to that of Lord Northington; however, Sir Thomas Plumer, M. R., in his elaborate judgment in *Lloyd v. Williams*, 1 Madd. 464, said that, on consulting the Registrar's Book, he found the point never arose in *Cockel v. Phipps*, and that no case had touched upon the decision of Lord Northington in *Scriven v. Tapley*, and that from that time the decisions had been uniformly according to that case, and

that it would indeed have been surprising, if so correct a judge as Sir Thomas Sewell should, so soon after the decision in *Scriven v. Tapley*, have acted in direct contradiction to it.

The wife, therefore, may, at any time before the settlement is actually completed, waive her right to it, and thus defeat the interests of her children. "That the children," observes Lord Cottenham, "have no equity of their own, that it is only the equity that they obtain through the consent of the mother, is sufficiently clear from the fact, that if the mother, having attained the age of twenty-one, comes into court, and consents that the property shall be paid over to the husband, the Court will permit *it to be paid over, without reference to the interests of the children; but in no instance are the children permitted to assert an independent equity of their own; and in no instance has that right ever been permitted against the mother. It is against the father that the Court exercises jurisdiction, to exclude him from those rights which the law would otherwise give him; and then the Court deals with those rights as between the mother, whose property it is, and as between the children of the marriage, in such a way as may be thought for the interests of the family: *Hodgens v. Hodgens*, 11 Bligh. N. S., 104.

Sir Thomas Plumer, V. C., in *Lloyd v. Williams*, 1 Madd. 467, after an elaborate review of all the authorities, observes, that all the cases concur in showing that children have no right to a settlement "independent of contract or decree."

When the wife has entered into a contract, or has obtained a decree for a settlement, the interests of the children will not be defeated if she die without waiving it. Thus, as in *Lady Elibank v. Montolieu* and *Murray v. Lord Elibank*, where by a decree a reference is made to approve of a proper settlement, and the wife dies without waiving it (which, as before observed, she can do), her children may, by supplemental bill, claim the benefit of the decree, although no proposals for a settlement may have been made, and although they may not have been mentioned in the decree. See *Rowe v. Jackson*, Dick. 604; *Groves v. Perkins*, 6 Sim. 584; S. C., *Groves v. Clarke*, 1 Kee. 132. But if no mention is made of the children, the omission, if it has long been acquiesced in, will not be supplied. Thus, in *Johnson v. Johnson*, 1 J. & W. 479, where the interest of a fund in court was directed to be paid to the separate use of a married woman for life, with liberty for those entitled on her death to apply, Sir Thomas Plumer, M. R., said, that the Court ought to have referred it to the Master to approve of a proper settlement, instead of making that order; but that, as it was made thirty-four years ago, it could not then be altered.

In *Lloyd v. Williams*, 1 Madd. 450, the wife of a bankrupt being entitled to a legacy, she claimed her right to a settlement out of it, and an agreement was thereupon entered into between the assignees and the

executor, whereby, in consideration of a sum to be paid to the assignees, a settlement was to be made upon the wife and her children. The bankrupt obtained his certificate in the lifetime of his wife, who died before any settlement was made in pursuance of the agreement, leaving an only daughter. Sir Thomas Plumer, V. C., held, that the death of the mother did not disappoint the claim of the child.

[*462] In *Lloyd v. Mason*, 5 Hare, 149, *a married woman entitled to a legacy appeared by her counsel at the hearing of the cause, and claimed her equity to a settlement out of the fund. The legacy was directed to be carried to the separate account of the husband and wife. The husband was a bankrupt, and his assignee sold his interest in the legacy. The solicitors for the purchaser, and for the wife, agreed to refer the claim of the wife to their counsel; and the counsel determined that she was entitled to a settlement of a moiety, subject to the costs. Before any further steps were taken, the wife died, leaving children. It was held, by Sir James Wigram, V. C., that the husband and those claiming under him, were by the steps which had been taken, bound to allow a settlement of part of the fund upon the wife and children; and that, upon the death of the wife, the children were entitled to the portion which would have been settled. "If," said his Honor, "in order to decide this case, an obligation had been imposed upon me, of deciding between the conflicting opinions of Sir John Leach and Lord Langdale, I should certainly have taken a great deal of time to consider the matter. But I may, I think, decide the case without expressing an opinion upon that point; and the only observation which it will be necessary to make is this: It appears that the question, whether the children can, after the death of their mother, insist upon her equity to a settlement, depends not upon the question, whether the mother was bound, but upon the question whether the father was bound. It is clear, that an order, referring it to the Master to approve of a settlement, binds the husband, though it does not necessarily bind the wife. There may be a case in which the wife is not absolutely bound, but in which, as against the husband, the children are entitled to the benefit of the mother's equity. If the husband is bound, the children are certainly entitled. The question, whether the husband is, or is not bound, must be governed by the ordinary principles of the Court."

But if a married woman dies without having obtained a decree for a settlement out of her property, her children, even although she may have filed her bill claiming a settlement, will have no right to file a supplemental bill to enforce one: *Wallace v. Aldjo*, 2 Drew. & Sm. 216; 1 De G. Jo. & Sm. 643. And see *De la Garde v. Lempriere*, 6 Beav. 344; *Baker v. Bayldon*, 8 Hare, 210, overruling *Steinmetz v. Halthin*, 1 G. & J. 64.

Moreover, although the husband, in the event of his wife's death, is bound by a contract or decree for a settlement, yet the wife can, at any

time before it is actually made, waive her equity to a settlement. The opinion of Sir John Leach, indeed, was at one *time to the contrary. Thus in *Fenner v. Taylor*, 1 Sim. 169, where the husband of a woman entitled to a fund in Court signed a written agreement that he would settle half the wife's fortune upon her, Sir John Leach, V. C., held, that the wife could not waive her right to a settlement, so as to defeat her children. "Where the agreement of the husband," observed his Honor, "is carried into effect by the execution of a proper deed, it is not argued that the wife can then waive it; and upon principle, and by analogy, it should seem, that in equity there is no distinction between the agreement and the deed. Upon the whole, therefore, I come to the conclusion that this is an agreement which enures for the benefit of the children, and would be executed in this Court upon a bill filed by them, and cannot, therefore, be waived by the wife." Sir John Leach, however, was not aware that Sir William Grant, M. R., had, upon that identical agreement, but with reference to another portion of the fund, held that the wife might, notwithstanding the agreement, waive all right of herself and her children to a settlement under it; and Lord Brougham, approving of the decision of Sir William Grant, reversed that of Sir John Leach, 2 Russ. & My. 190: and Sir John Leach, when the wife waived her right to another portion of the same fund, allowed it to be paid to her husband, but he said that the reasons upon which he had formerly come to a different opinion (and to which he still felt disposed to adhere) appeared to him to be of considerable weight: *Fenner v. Taylor*, 2 Russ. & My. 195.

Upon the same principle, in *Baldwin v. Baldwin*, 5 De G. & Sm. 319, the wife of a lunatic being entitled to a share of the residue of an intestate's personal estate, filed a bill against her husband, praying a settlement of the fund on herself and children. After inquiries in the lunacy, the committee was authorized to assent to a settlement of one half of the fund; and by an order made in the cause it was referred to the Master to approve of a settlement. The Master accordingly approved of a settlement, by writing at the foot of the draft, and no further proceedings were had when the lunatic died. The wife subsequently died, having by will disposed of the whole fund. It was held by Sir James Parker, V. C., that the proposals in the Master's office had not been proceeded with to such a stage at the time of the lunatic's death as to preclude his wife from retiring from the proposed settlement; and the Court ordered the whole amount of the fund to be paid to the representatives of the wife. See *Lovett v. Lovett*, Johns. 118.

But if the wife, upon the bankruptcy of her husband, established her equity to a settlement, as *against the assignees, she will not be allowed afterwards to waive it in favour of her husband, so as to defeat the rights of her children, although she might do so in fa-

vour of the assignees: *Barker v. Lea*, 6 Madd. 330; *Whittem v. Sawyer*, 1 Beav. 593.

As to the amount of the wife's property to be settled.—When the husband is solvent, the amount to be settled upon the wife and children depends generally upon arrangements entered into between the husband and wife. And as we shall hereafter state more fully if he declines to agree to a settlement, the Court will, in general, if he has been guilty of no misconduct, allow him to receive the income of her property (*post*, p. 474). The amount, however, of the wife's property which is to be settled, is most frequently discussed in Court when he has become either bankrupt or insolvent.

The rule in general is, that, in the absence of special circumstances, one half of the wife's property shall be settled upon her, and the other half go to the husband or his assignees; *Jewson v. Moulson*, 2 Atk. 423; *Worrall v. Marlur*, 1 Cox, 153; 2 Dick. 647; *Brown v. Clark*, 3 Ves. 166; *Bagshaw v. Winter*, 5 De G. & Sm. 466; and see *Dunkley v. Dunkley*, 2 De G. Mac. & G. 396; *Re Grove's Trust*, 3 Giff. 575; *Spirett v. Willows*, 1 L. R. Ch. App. 520. But this is a matter in the discretion of the Court, which, taking into consideration the amount of the wife's fortune already received by the husband, or any previous settlement which may have been made, may settle a larger proportion of the fund. See *Green v. Otte*, 1 S. & S. 250; *Napier v. Napier*, 1 D. & W. 407; *Aubrey v. Brown*, 4 W. R. 425; and in *Coster v. Coster*, 9 Sim. 597, where, a husband having, without sufficient cause, separated from his wife, leaving her unprovided for, three-fourths of a fund in Court, arising from property bequeathed to the wife, was ordered by Sir L. Shadwell, V. C., to be settled on her and her issue generally and the remaining fourth to be paid to the husband. See also *Ex parte Pugh*, 1 Drew. 202; *Vaughan v. Buck*, 1 Sim. N. S. 284. *In re Suggitt's Trusts*, 3 L. R. Ch. App. 215.

It was at one time laid down by a very careful judge that the Court would not settle the whole of the property upon the wife. This was the case of *Beresford v. Hobson*, 1 Madd. 362: there was a bill filed by the assignees of the husband, who was a bankrupt, to recover money to which the bankrupt was entitled in right of his wife. The Master, upon a reference, approved of a settlement of the whole of the property on the wife and children. Upon exceptions being taken to the Master's report, it was argued, in support of the settlement, that the bankrupt [*465] had committed felony *by not surrendering, and that he had abandoned his wife, and lived in another country. Sir Thomas Plumer, V. C., after an elaborate review of the authorities, allowed the exceptions, observing, that it was said that the husband had committed a felony in not surrendering, and that the wife was separated from her husband, and that grounds of compassion were urged; but the felony was subsequent to the commission, and the separation from the husband

was not constrained, and was long posterior to the bankruptcy, when all the husband's rights had vested in his assignees; and, as to compassion, it must be remembered that it was due as much to the creditors and their families as to the bankrupt's wife and her children. That in no case had the Court given the whole to the wife. That the question, in most cases, had been, how much the wife should have; and in determining that, the Court had exercised a discretion, and had not tied itself down to any precise rule, but had never given the whole.

Notwithstanding the remarks of Sir Thomas Plumer, in *Beresford v. Hobson*, it is clear that the whole fund will under special circumstances be settled. Thus the whole of the legacy seems to have been settled upon the wife, as against the assignees of her husband, who was a bankrupt, in *Jacobs v. Amyatt*, 1 Madd. 376, which was cited in *Beresford v. Hobson*. Again, in *Brett v. Greenwell*, 3 Y. & C., Ex. Ca. 230, where the husband had taken the benefit of the Insolvent Debtors' Act, Alderson, B., said that he did not understand *Beresford v. Hobson*, and held the wife and her children entitled to the whole of the fund in Court, observing, that the situation of an insolvent was very different from that of a bankrupt; that the wife of an insolvent might be in the workhouse with her children, and yet, if the insolvent afterwards acquires property, neither the wife nor the children will be benefited by it, but the whole goes to the creditors; but a bankrupt, on the other hand, after he has obtained his certificate, is a free man. However, in *Napier v. Napier*, 1 D. & W. 407, where there was a fund in Court, amounting to 1000*l.*, the property of a married woman, whose husband had been discharged as an insolvent, Lord Chancellor Sugden ordered 600*l.* to be applied for the benefit of the wife and her children, and 400*l.* to be paid to the assignee, for the benefit of the creditors; and his Lordship observed, "that, in his opinion, *Brett v. Greenwell* could not be supported; for, however true it was, as stated in that case, that there did exist a difference as to the operation of bankruptcy and insolvency upon after-acquired property, upon which difference the decision there was rested, yet there was no distinction as to the *rights of assignees in the property of the bankrupt or insolvent at the time of the happening of the bankruptcy or insolvency, upon which rights the practice in bankruptcy alone could have been founded. The assignee of an insolvent husband must take the same interest in the wife's choses in action that the assignee of a bankrupt husband did."

Lord Chancellor Sugden, however, in this case, did not mean to lay it down as law that in no case could the Court in its discretion settle the whole fund upon the wife, but he seems to have thought either that the discretion was not properly exercised in *Brett v. Greenwell*, or, at any rate, that the distinction as to the rights of assignees in bankruptcy and insolvency laid down by the learned Baron in that case was not

correct, and ought not to influence the mind of the Court in the determining what the amount of the settlement should be.

It seems to be clear at the present day, that when the husband has become bankrupt or insolvent, and has already received a considerable fortune from his wife, the whole fund will be settled. Thus, in *Gardner v. Marshall*, 14 Sim. 575, where the husband had large advances made to him by his wife's father, and had the benefit of a provision made for his wife by her father's will, and afterwards became bankrupt, Sir L. Shadwell, V. C., held that the wife, who had no provision except the income of a fund under her uncle's will, was entitled to have the whole of that income settled on her for life for her separate use, without power of anticipation. "The question," observed his Honor, "is, in effect, what settlement ought to be made on the wife out of the whole property which came by her? and the sums that her father advanced to her husband were, in substance, though not in form, part of her fortune." See, also, *Re Merriman's Trust*, 10 W. R. (V. C. K.), 334; *Smith v. Smith*, 3 Giff. 121.

So, also, the whole fund may be settled when the husband is insolvent and has made no settlement on his wife (*Francis v. Brooking*, 19 Beav. 347; *Scott v. Spashett*, 3 Mac. & G. 599), even as against a purchaser for value from the assignees of the husband (*Ib.*), or as against his own assignee for value (*Marshall v. Fowler*, 16 Beav. 249; *Re Welchman*, 1 Giff. 31; *Duncombe v. Greenacre*, 29 Beav. 578); but not arrears of income: *Newman v. Wilson*, 31 Beav. 34; *In re Carr's Trusts*, 12 L. R. Eq. 609; but see *Life Association of Scotland v. Siddal*, 3 De G. F. & Jo. 271.

There will also be a stronger disposition to settle the whole fund upon the wife when it is small and barely sufficient for a provision for the wife and children (*In re Kincaid's Trusts*, 16 Jur. 106; 1 Drew. [467] 326; *Re Hooper's Trusts*, 6 W. R. (V. C. W.), 824); or where there has been misconduct on the part of the husband, as where he has deserted or behaved cruelly to his wife, and does not afford her the means of support: *Dunkley v. Dunkley*, 2 De Gex, Mac. & G. 390; *In re Cutler*, 14 Beav. 220; *Gent v. Harris*, 10 Hare, 383; *Layton v. Layton*, 1 Sm. & Giff. 179; *Re Disney*, 2 Jur. N. S. 206; *Koeber v. Sturgis*, 22 Beav. 588; *Re Ford*, 32 Beav. 621. But when negotiations had been carried on between the parties for several years, which had involved the assignee in considerable expenses, three-fourths only of the fund instead of the whole were settled; *Walker v. Drury*, 17 Beav. 482.

By a decree of judicial separation, the wife's choses in action not reduced into possession at the date of the decree become, under 20 & 21 Vict. c. 85, s. 25, her absolute property as if she were a feme sole. Where, therefore, a wife instituted a suit to enforce her equity to a settlement of a trust fund, and while the suit was pending, she obtained

a decree of judicial separation from her husband on the ground of cruelty, Lord Romilly, M. R., ordered the fund to be paid to her, and refused the husband his costs: *Johnson v. Lander*, 7 L. R. Eq. 228.

As to the mode of settlement.—With regard to the general nature of the settlement which the Court will direct to be made, it seems to be clear, that in the absence of special circumstances, the income of a personal fund will be given to the wife to her separate use for life, without power of anticipation, and the fund itself after her death to her children. *Gent v. Harris*, 10 Hare, 383, 384; *Francis v. Brooking*, 19 Beav. 349. And if there should be no issue, and the wife survives the husband, to her absolutely; but if the husband should survive the wife, then in the absence of special circumstances the Court will not defeat the legal right of the husband, but give the fund to him (*Carter v. Taggart*, 1 De G. Mac. & G. 286, 289; *Bagshaw v. Winter*, 5 De G. & Sm. 466; *Watson v. Marshall*, 17 Beav. 363; *Smith v. Smith*, 3 Giff. 121; *Duncombe v. Greenacre*, 29 Beav. 578; *In re Suggitt's Trusts*, 3 L. R. Ch. App. 215), or his particular assignee for value (*Carter v. Taggart*, 1 De G. Mac. & G. 286; and see *form of Order*, 5 De G. & Sm. 55; *In re Tubb's Estate*, 8 W. R. (V. C. K.), 270; *Ward v. Yates*, 1 Drew. & Sm. 80; *Spirett v. Willows*, 13 W. R. (V. C. S.), 1034, 1 L. R. Ch. App. 520), or general assignees (*Ex parte Pugh*, 1 Drew. 202; *Gent v. Harris*, 10 Hare, 383, 384), absolutely. The form of settlement in such cases was very fully discussed in *Spirett v. Willows*, 4 L. R. Ch. App. 407; and see abstract of settlement *there ordered. *Ib.* p. 411, [*468] approved of in *Croxton v. May*, 9 L. R. Eq. 404, 409.

The fact of the husband having assigned his interest, or having become bankrupt or insolvent, or of the wife's relations being in humble circumstances, will not be considered as sufficient reasons for deviating from the general rule, so as in default of issue to give the wife a general power of appointment, or in default of appointment to settle the property, to the exclusion of the husband or his general or particular assignees, upon the next of kin of the wife: *Carter v. Taggart*, 1 De G. Mac. & G. 286, overruling the decision of Sir James Parker, V. C., 2 De G. & Sm. 49; *Bagshaw v. Winter*, *Ib.* 466.

In order to avoid the expense of a settlement where the fund is small, it will be ordered to be brought into Court (*Bagshaw v. Winter*, 5 De G. & Sm. 468), if not there already, and the Court will direct the dividends to be paid to the wife for her separate use for life, and either declare the trust after her death (*Ib.*, and see *Watson v. Marshall*, 17 Beav. 363; and abstract of order to p. 305; *Walker v. Drury*, 17 Beav. 484; *Wright v. King*, 18 Beav. 461); or give liberty to the persons entitled at her death to apply: *In re Cutler*, 14 Beav. 220, 222.

Waiver of settlement.—If a woman wish to waive her equity to a settlement, her consent to her husband having her property must be formally taken upon her examination in Court (*Beaumont v. Carter*, 32

Beav. 586); or under a commission issuing from the Court (Seton on Decrees, 322, 2nd edit.); or from a competent court in a foreign state. See *Campbell v. French*, 3 Ves. 323.

But in general, if the wife is abroad, her consent must be taken by commission: *Tasburgh's case*, 1 V. & B. 507; *Gibbons v. Kibbey*, 10 W. R. (V. C. K.), 55; *Ireland v. Trembath*, 14 W. R. (V. C. S.), 275. However, in the case of *Minet v. Hyde*, 2 Bro. C. C. 663, it was ordered that the married woman should appear before some of the plaintiffs and a magistrate of Breda, to be privately examined in the French or German language, as to her consent, and the examination attested by notaries public, and translated on oath. And see *Parsons v. Dunne*, Belt's Suppl. to Ves. 276.

The consent of a married woman will not be taken until the amount of the fund is ascertained (*Edmunds v. Townshend*, 1 Anst. 93; *Jerne-gan v. Baxter*, 6 Madd. 32; *Sperling v. Rochfort*, 8 Ves. 180); except perhaps where it is only liable to diminution by the deduction of unascertained costs, the taxation of which has been directed: *Packer v. Packer*, 1 Coll. 92.

Nor will the consent be binding upon a married woman if made *under a mistake. Thus, where a married woman consented to [*469] her husband receiving the whole fund, being ignorant that the effect of his previous insolvency (of which the Court was not informed) would be to give it to his assignees, the Court ordered the whole fund to be settled. A consent given under these circumstances is not such as would have been taken, if the Court had known the facts; it would have inquired and fully explained the effect of the consent to the married woman. It is not a formal but a substantial objection; for it is the duty of the Court to explain to a married woman what she gets and loses by her consent: *Watson v. Marshall*, 17 Beav. 363.

The Court has power to postpone for a time the transfer to the husband, notwithstanding the consent of the wife (*Wright v. Rutter*, 2 Ves. jun. 673, 677; *Penfold v. Mould*, 4 L. R. Eq. 565), and she may retract her consent at any time before the transfer has been completed: *Penfold v. Mould*, 4 L. R. Eq. 562.

Neither the husband, nor his solicitor, nor any person connected with him, ought to be present at the examination: *In re Bendyshe*, 3 Jur. N. S. 727.

Where the wife waives her equity to a settlement, and consents to her husband having her property, an affidavit must be made by the husband and wife, either that there was no settlement upon their marriage, or, if there was a settlement, it should be produced, and an affidavit made by the husband and wife that there was no other settlement, and that the settlement itself does not affect the property which the wife consents to her husband having. See *Britten v. Britten*, 9 Beav. 143, and note, and the forms of affidavits there given.

Where the wife is domiciled in a foreign state, upon proof that by the laws of such state her husband would be entitled to the whole of the property, without making any provision for her, the consent of the wife will not be required by the Court, and the fund will be ordered to be paid to the husband, without his being required to make any settlement upon her (*Sawyer v. Shute*, 1 Anst. 63; *Campbell v. French*, 3 Ves. 323; *Dues v. Smith*, Jac. 544; *Anstruther v. Adair*, 2 My. & K. 513; *In re Molyneux Minors*, 5 Ir. Ch. Rep. 346; *M'Cormick v. Garnett*, 5 De G. Mac. & G. 278); or if the property of the wife is money to arise from the sale of land, the husband (not being an alien) electing to take it in an unconverted state may have a conveyance of it to himself in fee: see *Hitchcock v. Clendinen*, 12 Beav. 534, where the husband and wife were domiciled in Scotland.

But where the lady is a ward of the Court, although by the law of the country where her husband is domiciled she has no equity to a settlement, the Court will not part with funds belonging [*470] to her unless satisfied that a proper provision has been made upon her: *In re Tweedale's Settlement*, Johns. 109.

The proof of the law in foreign states in such cases being one of fact, it will not be decided by authority, but by the evidence in each case: *M'Cormick v. Garnett*, 5 De G. Mac. & G. 278.

Where it was sought to have funds belonging to a domiciled Scotch feme covert paid out of Court, and a Scotch settlement was in existence, the Court required the testimony of a Scotch advocate, to show that it did not affect the fund, not being satisfied with the affidavit of a gentleman describing himself as a "solicitor practising in the Supreme Courts of Scotland, Edinburgh:" *In re Todd*, 19 Beav. 582.

The consent of the wife is not requisite where the fund is under 200*l.*, but before payment it must be shown that it is not in settlement: *Elworthy v. Wickstead*, 1 J. & W. 69; *Hedges v. Clarke*, 1 De Gex. & S. 354. But an affidavit as to there being no settlement, has been dispensed with where the fund to which the married woman was entitled was very small. See *Veal v. Veal*, 4 L. R. Eq. 115, where it was only ten pounds.

In Ireland, it seems money in Court belonging to the wife, not exceeding 100*l.*, may be paid to her husband without her consent: *In re Surridge's Trusts*, 17 I. Ch. 163.

It was at one time thought that the wife was not entitled to a settlement, where the fund was under 200*l.* (*Foden v. Finney*, 4 Russ. 128); it has, however, been held by Sir John Romilly, M. R., that the wife, although her consent may not be requisite before payment of a sum under that amount to her husband, is as much entitled to a settlement out of a small as out of a large sum. See *Re Culler*, 14 Beav. 220; which case has been followed by Sir R. T. Kindersley, V. C.; see *In re Kincaid*, 1 Drew. 326.

A married woman cannot waive her right to take her reversionary personal property by survivorship (*Osborn v. Morgan*, 9 Hare, 432, 434, and see *In re Godfrey's Trusts*, 1 I. Eq. 531); whether it might possibly vest in possession during the coverture, or could only vest after the husband's death: *Box v. Box*, 2 C. & L. 605; *Box v. Jackson*, Dru. Ca. t. Sugd. 42; where all the authorities on the subject are reviewed: but see now 20 & 21 Vict. c. 57.

An infant feme covert cannot give her consent. See *Stubbs v. Sargon*, 2 Beav. 596; *Abraham v. Newcombe*, 12 Sim. 566, overruling *Gullin v. Gullin*, 7 Sim. 236.

A female ward of the Court, married without its authority, or [*471] *in contempt of it, will not be allowed to waive her right to a settlement out of her own property (*Stackpole v. Beaumont*, 3 Ves. 89); and the settlement will in general be much less in favour of the husband than in ordinary cases, as the Court will attend principally to the interest of the wife, and her children by that or any subsequent marriage (*Stevens v. Savage*, 1 Ves. jun. 154; *Chassaing v. Parsonage*, 5 Ves. 15; *Millet v. Rowse*, 7 Ves. 419; *Bathurst v. Murray*, 8 Ves. 74; *Wells v. Price*, 5 Ves. 398; *Winch v. James*, 4 Ves. 386; *Priestly v. Lamb*, 6 Ves. 421; *Halsey v. Halsey*, 9 Ves. 471; *Pearce v. Crutchfield*, 16 Ves. 48; *In re Healey*, 1 C. & L. 393; *In re Anne Walker*, L. & G. t. Sugd. 325; *Hodgens v. Hodgins*, 11 Bligh. N. S. 62; 4 C. & F. 323; *Birkett v. Hibbert*, 3 My. & D. 227); especially when a man of no fortune marries a ward without the leave of the Court, with the sole object of getting possession of her property. See *Like v. Beresford*, 3 Ves. 506; *Ball v. Coutts*, 1 V. & B. 303.

In a recent case, however, a ward of the Court, who married without its leave, though with the consent of her guardian, was allowed, on coming of age, to consent to her husband having her property without his making a settlement on her: *Bennett v. Biddles*, 10 Jur. 534.

But the Court has no power over the property of an infant not being a ward of the Court, either under its general jurisdiction, or under statute 18 & 19 Vict. c. 43. *In re Potter*, 7 L. R. Eq. 484.

What will defeat or bar the wife's equity to a settlement.—The receipt by the husband or his assignees of the rents and profits, or a transfer of the fund, will defeat the wife's right to a settlement; and, as laid down by Lord Eldon, in the principal case, "previously to a bill, a trustee, who has the wife's property, real or personal, may pay the rents and profits, and may hand over the personal estate to the husband, but not if the bill has been filed; and if the husband, or those claiming under him, can obtain the property of the wife by an action at law, equity will not by injunction prevent them from doing so." See also *Milner v. Wilmer*, 2 P. Wms. 641; *Jewson v. Moulson*, 2 Atk. 420; *Allday v. Fletcher*, 1 De G. & Jo. 82. But after a bill has been filed, trustees could not safely make any payments to the husband; *Ma-*

caulay v. Philips, 4 Ves. 18; *De la Garde v. Lempriere*, 6 Beav. 344, 347.

Where a married woman who, prior to her marriage, was entitled under a will to a debt, payable after the death of her sister, secured on land by a deposit of title deeds, by deed acknowledged, joined her husband in assigning her share and interest in the said *debt, and [*472] the said real security, in order to secure monies due by her husband, it was held by Sir J. Stuart, V. C., in a suit to administer the testator's estate, that she was not entitled to a settlement out of the proceeds of the real estate. *Cook v. Williams*, 11. W. R. (V. C. S.) 504.

But injunctions, in many instances, have been granted to restrain the husband from proceeding in the Ecclesiastical Court for a legacy due to his wife, until he had agreed to make a reasonable provision for her; *Jewson v. Moulson*, 2 Atk. 420; *Gardner v. Walker*, 1 Stra. 503; *Elibank v. Montolieu*, 10 Ves. 90.

Where a woman at the time of her marriage owes more than the whole amount of her property, she will have no equity to a settlement out of it. See *Bonner v. Bonner*, 17 Beav. 86. In that case a married woman was indebted previous to her marriage, and the debt was proved under the husband's bankruptcy, the debt being greater than the fund, it was held that she was not entitled to a settlement, but that the whole fund should be paid to the assignees.

But if the value of her property exceeds the amount of the debts she owed before marriage, she may be held entitled to a settlement out of the property, after provision has been made for payment of the debts. See *Barnard v. Ford*, 4 L. R. Ch. App. 247, where there was a declaration in this form: "That Mrs. Barnard is entitled to no settlement until after provision is made for her property of an amount equal to the debts owing from her at the date of her marriage, which shall, previously to the Chief Clerk's certificate, be proved under her husband's bankruptcy; an inquiry as to her debts and property; and then an inquiry, whether Mrs. Barnard is entitled to any settlement, having regard to the above declaration."

The wife's equity to a settlement will be barred by an adequate settlement having been made upon her, but not by an inadequate settlement, unless it be by an express stipulation before marriage. *Salwey v. Salwey*, Amb. 692; *Garforth v. Bradley*, 2 Ves. 675; *Spirett v. Willows*, 5 Giff. 49; 1 L. R. Ch. App. 520.) And in a recent case, where an adequate settlement had been made upon the wife, the husband was held to be entitled to the whole fund, although he was living apart from his wife, they having separated by mutual consent and agreement, and no blame being imputed to one party more than the other. *In re Erskine's Trusts*, 1 K. & J. 302; *Spicer v. Spicer*, 24 Beav. 365; *Giacometti v. Prodgers*, 20 W. R. (V. C. M.) 858.

A married woman may, by fraud, preclude herself from claiming her equity to a settlement. See *In re Lush's Trusts*, 4 L. R. Ch. App. 591. There, a woman, *two months after her marriage, wrote [*473] and signed in her maiden name, a paper dated before the marriage, and purporting to give to her husband, in consideration of the marriage, her reversionary interest in a trust fund. She signed this paper for the purpose of enabling him to borrow money on her reversionary interest; he threatening that if she did not sign it, he would send her back to her relations, with whom she was on bad terms. The husband sold the reversionary interest; and part of the purchase-money was paid to the wife. Shortly before the completion, which took place on the 14th of October, 1858, the husband being at the time in prison for debt, she signed and gave to the purchaser's solicitor a letter, dated the 11th of October, 1858, addressed to one of the trustees of the fund, stating that she had before her marriage assigned her interest in the trust fund to her husband. Upon the reversion falling into possession by the death of the tenant for life, she claimed her equity to a settlement on the ground that the paper signed after marriage did not bind her. No fraud on the part of the purchasers was suggested, nor does there appear to have been any negligence on their part equivalent to fraud. It was held by the Lords Justices of the Court of Appeal, reversing the decision of Lord Romilly, M. R., that as the woman had been guilty of a fraud, she was prevented claiming her equity to a settlement against the purchaser. "The parties," said Lord Justice Selwyn, "who were about to advance the money, and who did advance it three days after the date of the letter of the 11th of October, 1858, were entitled to believe the representations made by her in that letter; and I think she cannot now be heard to say that they ought to have disbelieved those representations. I think it would be contrary to equity and good conscience to allow a lady who had made under such circumstance a declaration so clear and distinct as that, to set up afterwards a claim to an equity to a settlement, so as to defeat the interests of the purchasers, who, upon the faith of that representation, have paid the purchase-money in respect of her interest."

If the wife be living in adultery, apart from her husband, she cannot, except under very peculiar circumstances (*In re Lewin's Trust*, 20 Beav. 378), insist upon her equity to a settlement (*Carr v. Easta-brooke*, 4 Ves. 146); but even then it seems the husband will not be allowed to receive the whole of her property, while he does not maintain her. See *Ball v. Montgomery*, 2 Ves. jun. 191, in which case Lord Loughborough ordered the future dividends of the fund to be paid into Court, subject to further order; observing that the wife's delinquency [*474] was a *good ground for not paying it to her, but was not a ground for letting the husband receive the whole of the prop-

erty, which, being hers originally, was intended to be his, partly to support her.

Where both husband and wife are living in adultery, it has been held that the wife may claim a settlement: *Greedy v. Lavender*, 13 Beav. 62.

A female ward of Court, married without its consent, will not be barred from her claim to a settlement, although she should be living in adultery: *Ball v. Coutts*, 1 V. & B. 302, 304; *In re Anne Walker*, L. & G. t. Sugd. 299.

Wife, when allowed maintenance by Court out of her equitable property.—If the husband refuse to make a settlement upon his wife, the Court will not go so far as to do anything in diminution of his legal rights, so as to take away the produce of his wife's property from him, or prevent his receiving the interest, so long as he is willing to live with and to maintain her, and there is no reason for their being apart. The Court, however, will retain the capital, so as to give the wife a chance of taking it by surviving her husband: *Sleech v. Thorrrington*, 2 Ves. 562. And see *Oxenden v. Oxenden*, 2 Ves. 493; *Williams v. Callow*, 2 Vern. 751.

This course it seems will be adopted where a husband and wife are entitled to a fund as tenants by entireties: see *Atcheson v. Atcheson*, 11 Beav. 485, where a husband and wife being entitled to a legacy as tenants by entireties, the wife claimed a settlement out of the *whole* fund, the husband claimed that a moiety ought to be paid to him, Lord Langdale, M. R., ordered the legacy to be carried over to the joint account of the husband and wife; with a direction to pay the dividends to the husband during their joint lives, with liberty, on the death of either, for the survivor to apply. "The joint interest," said his Lordship, "given to husband and wife in this way, or the joint tenancy between them, if it can be so called, is so modified by the unity of the persons in law,—the consequent rights of the husband and wife by entireties, and the contingent right of the survivor to the whole, if not previously disposed of by the husband,—that it does not appear to me to be subject to the ordinary incidents of joint-tenancy. And, it not being ascertainable what belongs to the wife separately, or what the husband is entitled to in her right, I am unable to decide out of what portion of the legacy a settlement can be made upon her, according to the rules of this Court." And see *Attorney-General v. Bacchus*, 9 Price, 30; 11 Price, 547. But it seems that, if a fund, to which the husband and wife are entitled as tenants by entireties, as in the case of the legacy in *Atcheson v. *Atcheson*, be not brought under the consideration of the Court, payment to the husband, in the life-time of the wife, would be a good payment. Per Lord Langdale, M. R., in *Atcheson v. Atcheson*, 11 Beav. 491: and see *Grute v. Locroft*, Cro. Eliz. 287. [*475]

Where the husband was a lunatic, not found so by inquisition, and

the fund was small, the dividends were ordered to be paid to the wife: *Stead v. Calley*, 2 My. & K. 52.

In *Bond v. Simmonds*, 3 Atk. 21, Lord Hardwicke went so far as to say, that, where a husband has received a good part of the wife's portion, and only a small part remains, and the husband is so perverse that he will not make a competent settlement on the wife, the Court will not only stop the payment of the residue of her fortune to the husband, but will even prevent his receiving the interest of that residue, that it may accumulate for the benefit of the wife, unless he is starving for want of maintenance.

Where, however, the husband deserts the wife, and leaves her unprovided for, the Court will direct the payment of the interest of the wife's property to her, until the husband returns and maintains her as he ought to do: *Watkins v. Watkins*, 2 Atk. 96; *Sleece v. Thorington*, 2 Ves. 562; *Peters v. Grote*, 7 Sim. 238; *Rishton v. Cobb*, 9 Sim. 620.

It has been before shown, that, according to the decisions of the Court, although a married woman, as against the assignees of her husband in bankruptcy or insolvency, is entitled to have a settlement or maintenance out of her equitable property, in which she has *only a life* interest (*Lumb v. Milnes*, 5 Ves. 517; *Brown v. Clarke*, 3 Ves. 166; *Jacobs v. Amyatt*, 1 Madd. 376, n.; *Sturgis v. Champneys*, 5 My. & Cr. 97; *Vaughan v. Buck*, 13 Sim. 404; *Koeber v. Sturgis*, 22 Beav. 588; *Squires v. Ashford*, 23 Beav. 132), she, nevertheless, cannot claim either, as against the legal right of her husband, not being bankrupt or insolvent, although he may be in difficulties, (for the husband is entitled to the wife's income as long as he maintains her to the best of his ability, and they are living together): *Vaughan v. Buck*, 13 Sim. 404. Nor can she claim a settlement or maintenance out of the income of her equitable property, as against the particular assignee for value of her husband, although subsequently to the assignment he may become bankrupt or insolvent, or desert and leave her utterly destitute (*Tidd v. Lister*, 3 De Gex, Mac. & G. 857, ante, p. 457); but if the husband deserts the wife, leaving her unprovided for, the Court will allow her past and future maintenance out of the income of her life interest in [476] equitable property, not specifically assigned by the *husband for value: *Wright v. Morley*, 11 Ves. 12, 23; *Gilchrist v. Cator*, 1 De Gex & Sm. 188; *Allerton v. Knowell*, cited 4 Ves. 799; *S. C.*, nom. *Atherton v. Knowell*, 1 Cox. 229; *Coster v. Coster*, 1 Keen, 199. And where a person made pecuniary advances to a married woman, deserted by her husband, on the credit of fund in Court—her property, for her maintenance, exceeding the amount of the income, he was reimbursed out of the capital: *Guy v. Pearkes*, 18 Ves. 195; and see *Re Ford*, 32 Beav. 621.

And a husband who has deserted his wife and ceased to maintain her, although he received the income of her property vested in trustees, has

been compelled in equity personally to repay the person who advanced moneys to her for, and which were actually applied by her in the purchase of, necessaries. *Deare v. Soutten*, 9 L. R. Eq. 151; *Jenner v. Morris*, 1 Dr. & Sm. 218; 3 De G. F. & J. 45, overruling *May v. Skey*, 16 Sim. 588; and see *Harris v. Lee*, 1 P. Wms. 482; *Hutchinson v. Standley*, 9 L. R. Eq. 152, cited.

And the Court will not allow the right of a wife for maintenance to be defeated by her husband making a fraudulent conveyance of her property to trustees for payment of his debts; *Colmer v. Colmer*, Mos. 113, 118.

In order to favour as far as possible all efforts towards reconciliation on the husband's part, notwithstanding a decree has been made allowing the wife a separate maintenance, upon his consenting to cohabit with her, and promising to use her kindly, the Court has refused to continue the separate maintenance; per Lord Hardwicke in *Head v. Head*, 3 Atk. 296; and see *Gilchrist v. Cator*, 1 De G. & Sm. 188.

A woman cannot represent herself as deserted when her husband leaves her in the course of his duty, and she refuses to accompany him; see *Bullock v. Menzies*, 4 Ves. 798, in which case the husband was an officer in a marching regiment.

However, when the cruelty or improper conduct of the husband renders her leaving him necessary or justifiable, and there is no impropriety on her part, the Court will hold her entitled to maintenance or a settlement. See *Oxenden v. Oxenden*, 2 Vern. 293; *Williams v. Callow*, 2 Vern. 752; *Atherton v. Nowell*, 1 Cox, 229; *Eedes v. Eedes*, 11 Sim. 569. And where the husband has so conducted himself that the wife cannot live with him, as, for instance, where she has obtained against him a divorce upon the ground of cruelty and adultery, especially if it appears that he married her from merely interested motives, and is not maintaining her, the Court may give to the wife the income of the whole of her property, although the husband *may have received nothing from her on her marriage: *Barrow v. Barrow*, 5 De G. Mac. & [*477] G. 782.

But the court will not give the wife maintenance out of property given to her for life, if she has already an adequate provision for her separate use. Thus, in *Aguilar v. Aguilar*, 5 Madd. 414, although the husband had taken the benefit of the Insolvent Debtors' Act, Sir John Leach, V. C., refused the wife a further maintenance, upon the ground that she had an ample separate provision for maintenance secured to her by settlement, as well as a further separate provision under the will of a relation. "The principle," said his Honor, "upon which this Court gave such a provision out of property of this description against the husband when he deserted his wife, and against his general assignee in case of his bankruptcy or insolvency, was, that the law, when it gave the wife's property to the husband, imposed upon him the obligation

band, the bankrupt." After referring to *Wall v. Tomlinson*, 16 Ves. 413, and *Glaister v. Hewer*, 8 Ves. 207, his Honor said that for these reasons, and upon these authorities, he was of opinion that the widow was absolutely entitled to the whole of the funds in question, except that part which was purchased with the sum paid to the husband without any condition. . . . That small sum belonged to the bankrupt's estate, as it had been reduced into possession, and invested without consideration in the names of the trustees for the wife's benefit.

A trustee is always justified in refusing to pay over the wife's fund to the husband even at her request, and insisting on affording her an opportunity of asserting her equity to a settlement, and where a trustee has paid into Court a fund to which a married woman is absolutely entitled, he is entitled as of course to his costs between solicitor and client, unless his conduct has been simply capricious or vexatious. *Re Swan*, 2 Hem. & Mill. 34; sed vide contra, *Penfold v. Bouch*, 4 Hare, 271; in [*480] that case, however, when the demand *was made upon the trustee, there had been already what the Court considered a sufficient settlement made by the husband on the wife, so that her equity to a settlement was clearly exhausted: 2 Hem. & Mill. 38.

Where a trustee has reason to believe that the husband and wife have agreed to settle a sum of money in his hands, and especially if the wife does not distinctly express a wish that payment is to be made to her husband, he would be justified in paying the money into Court. *In re Bendyshe*, 3 Jur. N. S. 727.

The equitable principle of a wife's claim to a reasonable and adequate provision out of her equitable choses in action, or out of any property of hers which is under the jurisdiction of the Court of Chancery, is generally adopted and enforced in this country. It is familiarly applied in New York, Maryland, South Carolina, Georgia, and Kentucky, as will be seen by subsequent references; and it is also recognized and sustained in Maine, Vermont, Virginia, Tennessee and Alabama: *Tucker v. Andrews*, 13 Maine, 124, 128; *Chase v. Palmer*, 25 Id. 342, 348; *Short v. Moore*, 10 Vermont, 446, 451; *Wilks v. Fitzpatrick*, 1 Hum-

phreys, 54, 58; *Coppidge v. Threadgill*, 3 Sneed, 577; *Andrews and Bros. v. Jones et al.*, 10 Alabama, 401, 423; *Guild v. Guild et als.*, 16 Id. 122, 123; *Wiles v. Wiles*, 3 Maryland, 1; *James v. Gibbs*, 1 Paton & Heath, 277; *Lay v. Brown*, 15 B. Monroe, 295; *Ward v. Amory*, 1 Curtis, 419; *Barron v. Barron*, 24 Vermont, 375. It is likewise enforced in Massachusetts, as far as the equity powers of that state permit; *Page v. Estes*, 19 Pickering, 269, 271; *Gassett and others v. Grout and Trustee*, 4 Metcalf, 486, 489; *Davis and others v. Newton*, 6 Id. 537, 543; *Gardener v. Hooper*, 3 Gray, 398; removing any doubts created

by *Sawyer v. Baldwin*, 20 Perick-ing, 378, 387. As to its adoption in New Hampshire, see *Parsons v. Parsons et al.*, 9 New Hampshire, 309. In Pennsylvania, though it was formerly considered that from the want of adequate chancery powers in the Courts of that State, the wife's equity would not be enforced; (*Yohe v. Barnet*, 1 Binney, 358, 365; and see *Slifer and others v. Beates and another*, 9 Sergeant & Rawle, 166, 183; and *Johnson v. Matson*, 1 Penrose and Watts, 371, 373;) it has since been held that there is no insuperable difficulty in giving effect to this claim, through the medium of imposing terms and conditions to the recovery of the wife's *choses in action* at law, by the husband or his assignees; and that, wherever a court of chancery would protect the wife, or give her relief, in a suit brought in equity or at law to recover property belonging to her, the same thing can be done in Pennsylvania, by preventing a recovery except on terms: *Rees v. Waters*, 9 Watts, 90, 94. The existence of this equity was at one time thought doubtful in Virginia; see *Gregory's Adm'r v. Marks's Adm'r*, 1 Randolph, 355, 372. "This rule," said Marshall, C. J., in *Gallego v. Gallego's Executor*, 2 Brockenbrough 286, 288, "has never been recognized, so far as we are informed, in the courts of Virginia: but it has never been denied, and we can conceive no principle on which it should be denied. That those who ask equity should do equity, is a fundamental rule of that court, which enters into, and mingles

with, all its decisions; and that the property of a married woman should not be taken from her, without making some provision for her, is as equitable in Virginia, as elsewhere." Since that time it appears to be fully received in Virginia. *Browning v. Headley*, 2 Robinson's Virginia, 342, 371; see, however, *Dold's Trustee v. Geiger's Adm'r*, 2 Grattan, 98, 104. North Carolina seems to be the only State in which this jurisdiction is wholly denied and rejected: *Bryan v. Bryan*, 1 Devereux, Equity, 47; *Lassiter v. Dawson*, 2 Id. 383.

A sufficiently good account of this equity is given in *Durr v. Bowyer*, 2 M'Cord's Chancery, 368, 372. "By the common law," it is there said, "all the chattels which belonged to the wife before marriage, or to which she becomes entitled in her own right, are vested in the husband absolutely, with respect to things in possession, and he may dispose of them as he pleases; but with respect to things in action, although the right to reduce them into possession is by law vested in him, the courts of equity have built up a system founded on good sense and common justice, which is intended to secure to the wife a suitable provision for her support and sustenance. The interest which the wife has in *choses in action*, which belonged to her at the marriage, constitutes what is technically called the wife's equity; with respect to which it may be laid down as a general rule, that if it be within the reach of the court,

as if it is vested in trustees, or has been paid into court, or in any other situation which brings it within the control of this court, it will not be permitted to be removed out of that jurisdiction until an adequate provision is made for the wife, unless she has been already sufficiently provided for, or on her personal examination she thinks proper to waive the benefit of this protection."

But though the wife's claim to a settlement out of her equitable estate, is admitted to be founded, inherently, in reason, and natural justice, and an enlightened humanity, (see *Helms v. Franciscus*, 2 Bland, 545, 576; *Bell et al. v. Bell*, 1 Kelly, 637, 639, 640;) it did not come into application as a ground of original jurisdiction in chancery. It was enforced only incidentally, and as a part of the practice of the court, in the course of a suit by the husband or his representative for the wife's *choses in action*. It is now dealt with more expansively and liberally; but its extent is still uncertain, and to be determined by a reference to actual decisions, and perhaps varying in the administration of different tribunals.

The practice, which constituted, originally, the extent of the relief given upon this subject, and which may be considered as fully established in all the courts in which equity is recognized at all, is, that whenever the husband, or any one claiming under him, files a bill in equity to recover the wife's property, a reasonable settlement upon herself and her children will

be required, unless waived by her upon a separate examination; the principle being, as it is said, that those who ask equity must do equity, and therefore that a court of chancery will not lend its aid, except on terms of the applicant's giving effect to the wife's equity for a provision. And the doctrine may now be considered as expanded into this general principle; that whenever the wife's property is under the jurisdiction of the court, in such a manner that it requires a decree or order of the court to put a party rightfully in possession of it, the court will not deliver it over, except upon terms of settlement being made. See *Howard v. Moffatt*, 2 Johnson's Chancery, 206, 208; *Glen v. Fisher*, 6 Id. 33, 36; *Duvall v. The Farmers' Bank of Maryland*, 4 Gill & Johnson, 283, 290; *Groverman and Wife v. Diffenderfer*, 11 Id. 15, 22; *Helms v. Franciscus*, 2 Bland, 545, 575; *Durr v. Bowyer*, 2 M'Cord's Chancery, 368, 372; *Myers v. Myers*, 1 Bailey's Equity, 24, 31; *Yeldell et al. v. Quarles and Wife*, Dudley's Equity, 55, 56; *Hill v. Hill*, 1 Strobhart's Equity, 2, 24; *Bennett et ux. v. Dillingham*, 2 Dana, 436, 437; *Thomas, &c. v. Kennedy*, 4 B. Monroe, 235, 237; *Andrews and Bros. v. Jones et al.*, 10 Alabama, 401, 423; *Wilks v. Fitzpatrick*, 1 Humphreys, 54, 58; *Bell et al. v. Bell*, 1 Kelly, 637, 641; *Napier and others v. Howard*, 3 Id. 193, 204; *Browning v. Headley*, 2 Robinson's Virginia, 342, 371; *Page v. Estes*, 19 Pickering, 269, 271; *Gassett and others v. Groul*

and *Trustee*, 4 Metcalf, 486, 489; *Davis and others v. Newton*, 6 Id. 537, 543. The wife's equity will be enforced, not only where the husband's title to her property is equitable, as, where he sues for his wife's legacy, or distributive share, but also where the title of the claimant only, against or through the husband, is equitable, as where a creditor or assignee seeks to charge or recover a debt, or other legal *choses in action*, due to the wife before marriage; see *Gassett and others v. Grout*; *Davis and others v. Newton*; *Smith v. Kane*, 2 Paige, 303. The proceeds of the wife's real estate, remaining in court, and subject to its disposition, will also be made liable to this equity; *Hill v. Hill*, 1 Strobhart's Equity, 2, 26.

The general rule, still, appears to be, that if the husband or his assignee can obtain possession of the property, without coming into chancery, that is, by suit at law, or by delivery without suit, this equity will not be enforced, and that it is only when the property has been brought into court, or is there upon other grounds, or is under the care of the court, that chancery will grant this relief. See *Heath v. Heath and others*, 2 Hill's Chancery, 100, 104; *Udall v. Kenney*, 3 Cowen, 591, 599, 609; *Dold's Trustee v. Geiger's Adm'r*, 2 Grattan, 98, 103, 104; *The State v. Krebs*, 6 Harris & Johnson, 31, 37. This, according to the weight of authority, is the rule in ordinary cases; but there are some distinctions on the subject, which must be attended to.

VOL. I.—43

There is a class of cases which go considerably further, though they profess to go upon the same principle, that the property is under the jurisdiction and control of the court: these are, where a person has married a ward of chancery, without permission, and thereby committed a contempt of the court. In such cases, the court will restrain the husband and his creditors from taking possession of her estate, until a settlement is made upon the wife and the issue of the marriage: but this is quite distinct from the ordinary doctrine of the wife's equity, for it extends to all kinds of property, and the settlement is usually of the whole estate, or the full value of it. See *Kenney v. Udall*, 5 Johnson's Chancery, 464, 473; S. C., on error, *Udall v. Kenney*, 3 Cowen, 591, 602, 609; *Van Duzer v. Van Duzer*, 6 Paige, 366, 369; *Van Epps v. Van Deusen*, 4 Id. 65, 74; *Helms v. Franciscus*, 2 Bland, 545, 577; *Chambers v. Perry*, 17 Ala. 726; *post*, vol. 2, notes to *Eyre v. The Countess of Shaftesbury*.

There is yet another class of decisions, which indicate that where the husband has misbehaved, and abandoned or ill-treated his wife, so as to justify a divorce or separation, the wife's property in action, and it seems, also, even property not under the jurisdiction of the court, will be laid hold of by the Court of Chancery, and appropriated to the support of the wife and her children: see *Haviland v. Myers*, 6 Johnson's Chancery, 25, 178; *Van Duzer v. Van Duzer*, 6

Paige, 365, 368; *Martin v. Martin and another*, 1 Hoffman, 462, 467; *Helms v. Franciscus*, 2 Bland, 545, 574; *Rees v. Waters*, 9 Watts, 90. See also *Renwick v. Renwick*, 10 Paige, 421, 425.

It may probably, also, be considered as established, that if the husband is entirely insolvent, and the wife is without means of support, equity will sustain a bill by the wife, through her next friend, against the husband, or his assignees, or creditors, seeking to get possession of the property at law; see *Van Epps v. Van Deusen*, 4 Paige, 65, 74; *Martin v. Martin and another*, 1 Hoffman, 462, 467; and *Bell et al. v. Bell*, 1 Kelly, 637, and *Guild v. Guild and others*, 16 Alabama, 122, are direct authorities for that position. But see *Martin v. Trigg, &c.*, 7 B. Monroe, 528. And when the case is in other respects proper for relief, and the husband is within the limits of the jurisdiction of the court, the mere circumstance, that the property is in another State, or country, will not be a bar to the interposition of equity; *Gould v. Gould*; see *post*, vol. 2, note to *Penn v. Lord Baltimore*.

But that chancery will, in common cases, in the ordinary administration of the wife's equity, and when there is no insolvency, or special misconduct, or incapacity, on the part of the husband, sustain an original proceeding by the wife for the enforcement of her claim, when the property is not under the jurisdiction of the court, cannot be considered as yet established. In the New York chan-

cery cases, indeed, there are numerous *dicta* asserting that general proposition, and saying that a bill may be sustained against the husband or his assignees who may be proceeding at law; see *Van Epps v. Van Deusen*, 4 Paige, 65, 74; *Dewall v. Covenhoven*, 5 Id. 581, 582; *Van Duzer v. Van Duzer*, 6 Id. 366, 370; *Fry v. Fry*, 7 Id. 461, 463; *Martin v. Martin and another*, 1 Hoffman, 462, 468; and see also *Davis and others v. Newton*, 6 Metcalf, 537, 543; *Bell et al. v. Bell*, 1 Kelly, 637, 641: but there is yet wanting the authority of an adjudged case, in this country, applying this practice, upon the mere general ground of the wife's equity, and where there is not a special equity arising from the wife's destitution on account of the husband's misbehavior, or incapacity, to support her. In *Carter v. Carter*, 1 Paige, 463, the husband was a lunatic; and no committee having been appointed, the court, after asserting the wife's equity, on the principle in *Kenney v. Udall*, ordered the property to be transferred to an officer of the court. The remarks of Rogers, J., in *Rees v. Waters*, 9 Watts, 90, inclining to the view, that where the husband sued at law, equity might interpose and compel a settlement, were in a case where the husband had wholly deserted his wife. See the subject discussed at large, and the cases cited, in *Parsons v. Parsons et al.*, 9 New Hampshire, 309.

It is agreed, on all hands, that if the property has been actually reduced into possession, or is not

a mere right, or thing in action, but a complete legal estate vested in the husband, the wife's equity can no longer be enforced; *Rees v. Waters*; *Van Epps v. Van Deusen*, 4 Paige, 65, 74; *Van Duzer v. Van Duzer*, 6 Id. 366, 370; *Wickes v. Clarke*, 8 Id. 161, 172; *Whitesides v. Dorris, &c.*, 7 Dana, 101, 108; *Thomas v. Shepard*, 2 M'Cord's Chancery, 36, (but see remark on this case in *Heath v. Heath and others*, 2 Hill's Chancery, 100, 107;) *Perryclear v. Jacobs*, Id. 504, 509; *Mitchell v. Sevier et als.*, 9 Humphreys, 146. But if the fund, after being in court, is wrongfully paid out by a master to the husband without an order, the wife's equity, which had attached to it, will not be defeated; *Wardlaw v. Adm'rs and Heirs of Gray*, Id. 644, 652, 653. And to render payment, or delivery to the husband a bar to the equity of a wife to a settlement, or to her legal title as survivor, the property must be received or held by him in his own right, and not merely for the benefit of, or in trust for, the wife; *Barron v. Barron*, 24 Vermont, 375; and his declarations may be given in evidence, to show the character and purpose, in and for which the payment was made and received; *Gray's Estate*, 1 Barr, 329; *Goochenaaur's Estate*, 11 Harris, 460.

It is well settled, that the wife's equity will be sustained, not only against the husband, but against all persons claiming under him, and through the medium of his rights. It will be enforced against

his assignees, whether by act of law, such as assignees under a bankrupt or insolvent law; *Wiles v. Wiles*, 3 Maryland, 1; or by his voluntary act, and whether the assignment be general or special, and where it has been made for a valuable consideration without notice, or to a creditor in discharge of a just debt; and against his execution-creditors seeking to subject the property to the debts of the husband, or creditors claiming in any manner whatsoever. The equity of the wife is paramount to the interest, powers, and rights of the husband, and of all persons dealing with him. An assignee for a valuable consideration, may take a *chose in action* freed from the wife's contingent right of survivorship; but he cannot take it discharged from the wife's equity to a settlement. In these principles, there is no difference or doubt amongst the cases in this country. *Kenney v. Udall*, 5 Johnson's Chancery, 464, 476, 477; S. C., affirmed on error, *Udall v. Kenney*, 3 Cowen, 591, 599, 604, 606; *Haviland v. Myers*, 6 Johnson's Chancery, 25; *Mumford v. Murray*, 1 Paige, 620; *Van Epps v. Van Deusen*, 4 Id. 65, 74; *Page v. Estes*, 19 Pickering, 269, 271; *Phillips v. Hassell*, 10 Humphreys, 197; *Coppidge v. Threadgill*, 3 Sneed, 577; *Moore v. Moore*, 14 B. Monroe, 259; *Gassett and others v. Grout and Trustee*, 4 Metcalf, 486, 489; *Davis and others v. Newton*, 6 Id. 537, 543; *Durr v. Bowyer*, 2 M'Cord's Chancery, 368, 372; *Heath v. Heath and others*, 2

Hill's Chancery, 100, 105, 107; *Perryclear v. Jacobs*, Id. 504, 509; S. C., Riley's Chancery, 47, 50; *Duvall v. The Farmers' Bank of Maryland*, 4 Gill & Johnson, 283, 292; *State, use of Stevenson v. Reigart*, 1 Gill, 3, 27; *Elliott, &c. v. Warner*, 5 Monroe, 338, 341; *Bennett et ux. v. Dillingham*, 2 Dana, 436, 437; *Thomas, &c. v. Kennedy*, 4 B. Monroe, 235, 237; *Bowling and Boucher v. Winslow's Adm'r*, 5 Id. 29, 31; *Hord v. Hord, &c.*, Id. 81, 85; *Athey, &c. v. Knotts*, 6 Id. 24, 27; *Bowling's Adm'r v. Bowling et al.*, Id. 31; *Bell et al. v. Bell*, 1 Kelley, 637, 642, 643; *Napier and others v. Howard*, 3 Id. 193, 204; *Andrews and Bros. v. Jones et al.*, 10 Alabama, 401, 423, 424; *Browning v. Headley*, 2 Robinson's Virginia, 342, 371; *Sherrard v. Carlisle*, 1 Patton & Heath, 12; see, however, *Dold's Trustee v. Geiger's Adm'r*, 2 Grattan, 98. And it is equally well settled that the right of the wife will not be barred, nor that of the assignee enlarged, by her joining in the execution of the assignment, or by any thing short of her consent, given freely upon examination in court, or before some public officer duly authorized for the purpose; *Coppidge v. Threadgill*, 3 Sneed. 577, *ante*.

The wife's equity extends, in all cases, to a provision for her children as well as for herself; *Howard v. Moffatt*, 2 Johnson's Chancery, 206, 208; *Udall v. Kenney*, 3 Cowen, 591, 609; *Mumford v. Murray*, 1 Paige, 620; *Duvall v. The Farmers' Bank of Maryland*, 4 Gill & Johnson, 283, 290;

Groverman and Wife v. Dufferfer, 11 Id. 15, 22; *Helms v. Franciscus*, 2 Bland, 545, 581; *Napier and others v. Howard*, 3 Kelley, 193, 205; *Andrews and Bros. v. Jones et al.*, 10 Alabama, 401, 423. But the provision for children is a part of the wife's personal equity, and is not an independent and substantive equity in the children. Therefore, although when the wife has asserted her claim, and an order for a settlement has been made, and she dies before the settlement is completed, it has been thought that the children have acquired a vested interest, which will be carried through for their benefit; see *Mumford v. Murray*, 1 Paige, 620, 621; *Helms v. Franciscus*, 2 Bland, 545, 581; *Sherrard v. Carlisle*; yet, if the mother has taken no step to enforce her equity for a settlement, and has no contract for it, or if she has waived it, her children surviving her have no claim on the estate for a provision; *Barker, Executor, &c. v. Woods*, 1 Sanford, 129, 131; *Martin v. Sherman*, 2 Id. 341, 343; *Greev's Heirs v. Boone*, 5 B. Monroe, 554, 557; *Bell et al v. Bell*, 1 Kelley, 637, 641.

The equity of the wife is to a reasonable and adequate settlement upon herself and her children; and the adequacy will depend upon all the circumstances of the case, to be ascertained upon a reference to a master; and the settlement may extend to the whole or a part of the property; *Kenney v. Udall*, 5 Johnson's Chancery, 464, 478; *Udall v. Kenney*, 3 Cowen, 591, 606; *Haviland v. Myers*, 6 John-

son's Chancery, 25, 27; *Napier and others v. Howard*, 3 Kelly, 193, 205; *Phillips v. Hessel*, 10 Humphreys, 197; *Hall v. Hall*, 4 Maryland Ch. 283; *M'Vey v. Boggs*, 3 Id. 94. The term *adequate* is a relative term, and in determining the question of adequacy, regard will be had to the whole extent of the fortune brought by the wife; *Ex parte Beresford*, 1 Dessausure, 263, 268. In ordinary cases, the courts will not require the whole to be settled upon the wife; but if the husband be entirely insolvent, and there be no other provision for the wife, or if it be a case in which he has married, without permission, a ward of the court, the whole may be appropriated to the wife; *Helms v. Franciscus*, 2 Bland, 545, 577; *Bowling and Boucher v. Winslow's Adm'r*, 5 B. Monroe, 29, 31.

In like manner, the wife's equity is, in general, for a provision to take effect after the death of the husband, and he is entitled to the interest during his life, where he lives with and supports her; but, again, if the husband has deserted or ill-treated her, or is wholly insolvent, and the wife destitute, the maintenance provided for her, will be directed to commence immediately, and the income will be ordered to be paid to her, or to a trustee for her; *Dumond v. Magee*, 4 Johnson's Chancery, 318, 322; *Kenney v. Udall*, 5 Id. 464, 480; S. C., 3 Cowen, 591, 607, 609; *Helms v. Franciscus*, 2 Bland, 545, 574; see also, *Starrett v. Wynn and another*, 17 Sergeant & Rawle, 130.

Where an assignee or creditor of the husband files a bill to reach the wife's property, she may interpose her claim to a settlement, by petition, without resorting to a bill; and the practice of the court, in all cases, is to refer it to a master to inquire and report whether any and what settlement ought to be made; *Mumford v. Murray*, 1 Paige, 620, 621; *Duvall v. The Farmers' Bank of Maryland*, 4 Gill & Johnson, 283, 293. When the husband himself is suing for a legacy or distributive share due to the wife, she must be made a party to the bill, and then a provision will be compelled, unless she waives it; *Schuyler v. Hoyle*, 5 Johnson's Chancery, 196, 210; *Ringo et al. v. Warder, &c.*, 6 B. Monroe, 514; *Chase v. Palmer*, 25 Maine, 342, 348: and the practice appears, formerly, to have been to impound the property until the husband proposes terms of settlement before a master, and for the court to judge of the sufficiency; but probably, now, the court will order a master to inquire and report what are proper terms; see *Howard v. Moffatt*, 2 Johnson's Chancery, 206, 208; *Hill v. Hill*, 1 Strobhart's Equity, 2, 24. The court will not, *ex officio*, withhold the property or money from the husband until a settlement is made, nor will it order a settlement, absolutely, upon the application of a stranger, without the consent of the husband; the application for a settlement must be from the wife herself, or her guardian, or attorney, or some one standing in a similar situation to her: but on the other hand, the

court will not order the property to be transferred to the husband, until the wife has been consulted: of its own motion, it will merely direct an inquiry, whether any, and what provision has been made for the wife, and whether the wife will consent that the fund shall be paid to the husband; *Myers v. Myers*, 1 Bailey's Equity, 24, 32; *Yeldell et al. v. Quarles & Wife*, Dudley's Equity, 55; see also *Helms v. Franciscus*, 2 Bland, 545, 575. It would seem to follow, and has been held, that where the wife is an infant, the court will direct what seems in its discretion an adequate settlement, notwithstanding her wish or request that the whole should be paid over absolutely to her husband; *Phillips v. Hessell*, 10 Humphreys, 197.

The wife's equity is so substantial an interest, that it will constitute a valuable consideration for a post-nuptial settlement by the husband upon the wife. A voluntary settlement, upon such a basis, will, to the extent of that equity, be supported in Chancery, as against creditors: *Wickes v. Clarke*, 8 Paige, 161, 166; S. C., 3 Edwards, 58, 63; *Partridge v. Havens*, 10 Paige, 618, 624; *State, use of Stevenson v. Reigart*, 1 Gill, 3, 27; *Helms v. Franciscus*, 2 Bland, 545, 576, 579; *Perryclear v. Jacobs*, 2 Hill's Chancery, 504, 509, 510; S. C., Riley's Chancery, 47, 50; *Sibely & Morrison v. Tutt*, 1 M'Mullan's Eq. 320, 328. "I think it may be assumed as a rule," said the Vice-Chancellor, in *Wickes v. Clarke*, "that the same circumstances which would induce the

court to compel a settlement by the husband or those claiming under him or in his right, will operate to uphold a deed of settlement already made, to the same extent that would be required if one should be directed to be made under the view of the court." See, however, *Dold's Trustee v. Geiger's Adm'r*, 2 Grattan. 98.

In looking at the various cases upon the present subject, it is obvious that the wife's equity to a settlement out of her equitable choses in action, is a distinguishable principle from the wife's claim to a maintenance out of her estate in the case of her husband's neglect or failure to support her. The former takes effect after her husband's death, the latter immediately: the former extends to only a part of the fund in question, the latter may embrace the whole of it: the former applies only upon equitable interests which are still *sub judice*, the latter may be enforced against property which is fully under the control of the husband. Nor is the latter to be considered as an extended branch of the other; it appears to come from a different root, and to be a part of that suspension, or arrest, of the legal powers and rights of the husband, in respect to the wife's separate estate, which chancery enforces upon breach of the legal obligations and duty to support the wife, whether that breach of duty arise from moral, or from prudential misconduct, from unwillingness or from incapacity. The maintenance of the wife from her own property in cases of the husband's

neglect to provide for her, is, no doubt, a ground of original jurisdiction, to be exercised upon a bill filed by her: but according to the best view of the authorities, that ordinary and inherent claim, known strictly as *the wife's equity*, existing where there is no allegation of misbehavior or insolvency, is not the subject of active relief from chancery, but is protected only where the husband or his represen-

tative is asking for the decree or order of the court. In general, the wife's equity cannot be barred by any act *in pais*, nor without an examination before a judge or duly authorized officer of the court; but in *Wright v. Arnold*, 14 B. Monroe, 638, a married woman was held to be precluded from claiming against a purchaser from her husband, by standing by and assenting to the sale.

*HULME v. TENANT.

[*481]

JUNE 30, JULY 28, DECEMBER 14, 1778.

REPORTED 1 BRO. C. C. 16.¹

WIFE'S SEPARATE PROPERTY.]—*Bond of a feme covert, jointly with her husband, shall bind her separate property.*

THE bill was filed by the obligee of a bond, to secure 180*l.* entered into by the defendants, husband and wife, against the husband, wife, and her surviving trustee, to recover the sums secured out of the wife's separate estate.

Upon the marriage, the estates of the wife had been conveyed to trustees; one part, consisting of freehold and leasehold lands, in trust to *receive and pay the rents and profits to the wife for her separate use*, and to convey the estate itself to such use as she, by her last will in writing, or by deed or writing under her hand and seal, executed in the presence of two witnesses, should appoint; in default of appointment, to the use and behoof of her heirs and assigns; other parts to be sold, and out of the produce, 1000*l.* to be laid out according to the directions of the wife, the interest and profits to be paid to her, and the principal *to her, or her order, by note or writing under her hand*; and for want of such appointment, to her executors, administrators, and assigns.

This 1000*l.* had been raised, and the whole, or the greatest part applied, so that the question in the cause was with respect to the remedy against the other estate.

In 1769, the husband borrowed of the plaintiff, Mrs. Hulme, 50*l.*, upon his and his wife's bond. In 1770, having occasion for a further sum, the wife herself applied to the plaintiff, and borrowed 130*l.*, paid the interest due upon the former sum of 50*l.*, and [the husband and wife] gave a new bond for the 180*l.*

¹ S. C., 2 Dick. 560, Reg. Lib. 1778. A fol. 90.

[*482] *The cause had been heard before Lord Bathurst, who dismissed the bill. It came on now to be re-heard.

Mr. Mansfield opened for the plaintiff, but the reporter was absent.

Mr. Attorney-General¹ for the defendants.—The plaintiff is not entitled to the relief of a court of equity, but is to be left to make the best she can of the security at law. Trustees for a woman are appointed for the purpose of preventing her from doing acts prejudicial to herself, under the influence of her husband. The husband's credit not being good, the plaintiff has taken the wife's bond. The husband was indebted. He and his wife are co-obligors, and it is done with the approbation of the plaintiff's attorney, who must know it was void. He ought to have insisted upon a mortgage of her separate property. This Court will never look upon bonds as appointments where the party could not enter into the bond. In many cases of bonds with penalties, the Court considers the bond as the form only, and as evidence of the substance, and will not suffer the party to be free upon payment of the penalty; but in the case of an infant, where it is voidable only, the taking of the bond will not aid the taker in equity. I do not contend that a married woman cannot contract in respect of her separate property, but the party contracting must take a security agreeable to the nature of the property; he cannot better his security. *Peacock v. Monk*, 2 Ves. 190,² closes with a dictum, the authority of which is very doubtful; it had no affinity to the principal question

Mr. *Selwyn*, on the same side —There is no case where the point has been determined that a bond, in which the wife joins her husband, binds her separate property. *Norton v. Turvill*, 2 P. Wms. 144,³ was against the wife's representatives, which is very different from the present against the separate property settled upon her for life.

LORD CHANCELLOR THURLOW.—*Grigby v. Cox*, 1 Ves. 517, appears [*483] to be a decree for a specific performance. The *defect of that case is, that it does not state the trust. It is said that a feme covert is to be considered as a feme sole, with respect to every authority she can exercise over her separate estate; but it is different where the consent of the trustees is made essential to the conveyance, although the mere appointment of trustees is not sufficient to deprive her of that authority; for there must be trustees,⁴ otherwise she could have no separate property.

Mr. *Selwyn*.—In *Biscoe v. Kennedy*,⁵ Sir Thomas Clarke thought

¹ Wedderburne. ² See Belt's Suppl. 842. ³ 2 Eq. Ca. Ab. 152, pl. 14.

⁴ Trustees are not essentially necessary for the creation of a trust for the separate use of a married woman, as the husband will be converted into a trustee for her. See *Bennet v. Davis*, 2 P. Wms. 316; *Parker v. Brook*, 9 Ves. 583; *Rich v. Cockell*, 9 Ves 369.

⁵ *Biscoe v. Kennedy*, at the Rolls, 21st July, 1763, the defendant, Jane Kennedy, then the widow of Ormond Tomson, Esq., being indebted to the

it was to be considered as the property of a feme sole; but, in that case, the bond was given before the marriage of the parties.

[LORD CHANCELLOR THURLOW.—Do you consider that case as deciding that her property was liable to her acts only whilst she was a feme sole?]

Mr. *Schwyn*.—A feme covert can execute no act except by virtue of a power, or with the consent of the trustees, or by some means referring to her separate property; but, in this case, there is no reference whatsoever to her separate property, or consent of trustees. It is not wholly immaterial that the plaintiff has sued at law. In *Machorro v. Stonehouse*, in July last, upon marriage a sum was agreed to be laid out in the funds, upon trust that the dividends should be to the separate use of the wife; *the plaintiff bought the interest during the lives of the husband and wife, for eight years' purchase: there was no fraud. A bill was brought against the trustee for a transfer. Mrs. Stonehouse, in her answer, insisted this was against her consent, but there was evidence in the cause that they both had consented. This bill, so circumstanced, was dismissed with costs, by his Honor (Sir Thomas Sewell), who seemed shocked at the proposition that a married woman could be bound by an act done in conjunction with her husband.¹

Mr. *Mansfield*, in reply.—It is now laid down that a woman, having separate property, cannot dispose of it but by the means pointed out by the settlement, and with the consent of her trustees. It seemed to me that a feme covert, having separate property, was to that intent² a feme sole, and might borrow money

plaintiff Biscoe, in £114 by bond 22nd of April, 1755, and being possessed of several leasehold houses, and of £1000 East India Stock, by settlement on her marriage with the defendant James Kennedy, all her personal estate (excepting £500 East India Stock, which the husband was to have) was conveyed to the defendant McCulloch in trust for the separate use of the defendant Jane. The marriage having taken effect, the plaintiff filed his bill (without having sued the husband) to have the separate estate of the wife applied to the payment of the debt; which bill was dismissed. The plaintiff then sued out writs against James and Jane Kennedy; but James Kennedy absconding, could not be served, and the plaintiff proceeded to outlawry and then filed this bill, to be paid out of the wife's separate estate. The defendant insisted, that during her husband's life, her separate property was not liable to this debt, contracted by her while sole. The plaintiff contended that the settlement as to him was fraudulent. Upon the hearing his Honor declared, that upon the circumstances of the case, the effects of the defendant vested in her trustee, were to be considered as the property of a feme sole, and ordered the plaintiff's debt and costs to be paid out of the £500 East India Stock, in the hands of the trustee. Cur. Declare that under the circumstances of this case, the effects of the defendant Jane Kennedy, vested in the defendant McCulloch, are to be considered as the property of a feme sole, and as such liable in equity to make the plaintiff satisfaction for so much of the debt contracted by her while feme sole, as he has not been able to recover by means of the outlawry of James Kennedy, her husband.

Account of what remains due to the plaintiff, and tax his costs of suit, direct payment of debt and costs by sale of the East India Stock (comprised in the settlement) standing in the names of the defendant Jane Kennedy and defendant McCulloch, and liberty to apply. Reg. Lib. 1761, A., p. 517; 9 L. R. Eq. 562.

¹ Sed vide contra, *Standford v. Marshall*, 2 Atk. 68; *Pybus v. Smith*, 3 Bro. C. C. 340.

² Qy. extent.

and give securities. The consent of the trustees has been decided not to be necessary ; the use of trustees being only to guard it against the husband. Here, it is to such uses as she, by deed or will, should appoint. Mr. Attorney-General and Mr. Selwyn argue upon the ground that the bond was void ; that is begging the question. If we are right, though void at law, it is not void here. The latter of these two bonds, that to secure 180*l.*, was given on the mere motion of the wife ; no objection arises from the plaintiff's having sued at law : it was a legal security against the husband. As to an infant's bond : an infant is never considered here as an adult, but a feme covert is very often considered as a feme sole. In *Norton v. Turvill*, the assets were considered as being bound when she was dead ; then her property must have been bound whilst she was living. That case is decisive of the present question. The dictum in *Peacock v. Monk*, is mentioned as falling from Lord Hardwicke, and naturally, as being the general rule governing the property of women, and taking that particular case out of the rule. In *Biseoe v. Kennedy*, the separate property could not be the subject in dispute, the debts of a feme sole falling on her husband. In *Machorro v. Stonehouse*, the [485] woman lived *separate from the husband, and probably some fraud struck the learned judge.

LORD CHANCELLOR THURLOW.—My doubt arises principally upon the form of the relief, rather than the principles upon which the bill is brought ; it is a bill brought by the obligee upon a joint bond by husband and wife for 180*l.* to recover that sum out of the separate property of the wife. It is brought against the wife, the husband, and the trustees, for attaining the most extensive and perfect relief which the situation of her separate property will enable her or her trustees to afford.

The question is, what sort of execution this Court will award against that separate property ? It is created by deed, and is real estate conveyed to trustees, as to a considerable part of it, in trust to receive and pay the rents to the wife, and to convey the estates themselves according to the appointment of the wife, by her last will and testament in writing, or by deed or writing under her hand and seal, executed in the presence of two or more witnesses ; and, for want of such declaration or appointment, to the use and behoof of the wife, her heirs and assigns ; as to other parts, in trust, to be sold, and out of the produce of the sale, 1000*l.* to be retained by the trustees, to be laid out according to the directions of the wife, the profits to be paid to her, and the principal to her or her order, by note or writing under her hand ; and, for want of such appointment, to her executors, administrators, and assigns.

The rule laid down in *Peacock v. Monk*, 2 Ves. 190, that a feme covert acting with respect to her separate property, is competent to act in all respects as if she was a feme sole, is the proper rule, and necessary to support the decisions on this subject. The conse-

quence was that, in *Allen v. Papworth*, 1 Ves. 163,¹ where a bill was brought by husband and wife for an account, the wife, together with her husband, submitting that the profits of her separate estate should be applied to pay the husband's debts, she was bound by that submission, and the profits of her separate estate were by decree directed to be so applied. In **Grigby v. Cox*, 1 Ves. 517, where the wife had contracted to sell [*486] her separate estate, being authorized by settlement to dispose of it, the Court bound her, as a person equally competent as if sole, to a specific performance of that contract: I take it therefore, it is impossible to say but that a feme covert is competent to act as a feme sole, with respect to her separate property, where settled to her separate use.

But the question here goes a little beyond that; it is not only how far she may act upon her separate property: I have no doubt about that; but the question is, how far her general personal engagements shall be executed out of her separate property. If she had by instrument contracted that this or that portion of her separate estate, should be disposed of in this or that way, I think she and her trustees might have been decreed to make that disposition; but if she enters into an engagement, which would make a feme sole liable to the whole extent of the contract as to her person, &c., in every respect, it is clear such general engagement, entered into by a feme covert, will not bind her as such. It is not like the case of an infant, who is incapable of acting; but in respect to a feme covert, determined cases seem to go thus far, that the general engagement of the wife shall operate upon her personal property, shall apply to the rents and profits of her real estate, and that her trustees shall be obliged to apply personal estate, and rents and profits when they arise, to the satisfaction of such general engagement; but this Court has not used any direct process against the separate estate of the wife, and the manner of coming at the separate property of the wife has been by decree to bind the trustees, as to personal estate in their hands, or rents and profits, according to the exigencies of justice, or of the engagement of the wife, to be carried into execution.² I know of no case which has gone further than that. Suppose the wife to have power, by settlement, to dispose of her real estate to any uses she shall think fit, yet the trustees must make the formal instrument, without which the estate cannot pass. I know of no case where the general engagement of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make conveyance of that real estate, and by [*487] sale, mortgage, or otherwise, raise the money to satisfy that general engagement on the part of the wife. It may be difficult to give relief here without doing something of that kind, because that part of the real estate which was to be sold has been sold, and the money has been applied, with the direction of the wife,

¹ See a fuller and more correct statement of the case in Belt's suppl. p. 91.

² See also *Francis v. Wigzell*, 1 Madd. 258; *Aylett v. Ashton*, 1 My. & Cr. 105, 112.

by the hand of the trustee, who consequently is no longer liable as to that sum; so that so far as the 1000*l.*, it seems out of the reach of this Court, the trustee alleging that the money is paid, or not remaining in his hands.—[Mr. Ambler.—Only part paid over.]—I believe there is no instance of a personal decree against a feme covert, for payment of any sum whatever. Though her separate personal property is liable, yet the decree is to fetch forth her separate estate, and make it liable to her engagement. No lease found in the hands of the trustee is now before the Court; we cannot come at it. As a bond it is void, otherwise an extent might have gone.

LORD CHANCELLOR THURLOW.—I have no doubt about this principle, that, *if a court of equity says a feme covert may have a separate estate, the Court will bind her to the whole extent as to making that estate liable to her own engagements; as for instance, for payment of debts, &c.* But, although the remedy here is more extensive than in a court of law, I do not find the Court has ever ordered a power to be executed; it has industriously stopped short of so doing, and has only given a remedy by stopping the fund, where the power was executed; therefore, I cannot order the feme covert to execute her power, but I am exceedingly clear that the leasehold estate will be liable.

It stood referred to the Master¹ to take an account of the rents and profits of the leasehold estates; but, before any report, the parties came to a compromise, upon the defendant Frances paying the principal sum borrowed, with interest, without any costs.²

[*488] **“That at law,”* observes Lord Brougham, C., a feme covert cannot in any way be sued, even for necessities, is certain. Bind herself, or her husband, by specialty, she cannot; and, although living with him, and not allowed necessities, or apart from him, whether on an insufficient allowance or an unpaid allowance, she may so far bind him that those who furnish her with articles of subsistence may sue him; yet, even in respect of these, she herself is free from all suit. This is her position of disability, or immunity at law; and this is now clearly settled. Her separate existence is not contemplated; it is merged by the coverture in that of her husband; and she is no more recognised than is the cestui que trust or the mortgagor, the legal estate, which is the only interest the law recognises, being in others.

“But, in equity, the case is wholly different. Her separate existence, both as regards her liabilities and her rights, is here abundantly acknowledged; not, indeed, that her person can be made liable, but her property may, and it may be reached through a suit instituted against

¹ See order made by Lord Thurlow, C., extracted from the Registrar's Book in note to *Johnson v. Gallagher*, 8 De G. F. & Jo., p. 502 (a).

² See *Standford v. Marshall*, 2 Atk. 68; *Socket v. Wray*, 4 Bro. C. C. 483.

herself and trustees. It may be added that the current of decision has generally run in favor of such recognition. The principle has been supposed to be carried further in *Hulme v. Tenant*, than it had ever been before, because there a bond, in which the husband and wife joined, and which, indeed, so far as the obligation of the wife was concerned, was absolutely void at law, was allowed to charge the wife's estate vested in trustees to her separate use, though such estate could only be reached by implication; and though, till then, the better opinion seemed to be, that the wife could only bind her separate estate by a direct charge upon it. Lord Eldon repeatedly expressed his doubts as to this case; but it has been constantly acted upon by other judges, and never, in decision, departed from by himself; *Murray v. Barlee*, 3 My. & K. 220, 222.

Equity has long recognised the separate existence of a married woman as regards property given or settled to her separate use, and it will be hereafter seen that the legislature has by a recent statute (33 & 34 Vict., c. 93) in many cases attached the separate use to property coming to married women.

Wife's power of disposition over her separate estate.—The rule laid down in *Peacock v. Monk*, that a feme covert, acting with respect to separate property, is competent to act in all respects as a feme sole, is said by Lord Thurlow, in *Hulme v. Tenant*, to be the proper rule, and necessary to support the decisions on this subject.

Thus, it has been established, ever since the case of *Fettiplace v. Gorges*, 1 Ves. jun. 46; *S. C.*, *3 Bro. C. C. 8, that personal [*489] property settled upon a feme covert for her separate use, is to be enjoyed with all its incidents; and that, as the *jus disponendi* is one of them, she may, although there is no express power of disposition given to her, dispose of it, either by acts inter vivos, or by will (*Rich v. Cockell*, 9 Ves. 369; *Wagstaff v. Smith*, 9 Ves. 520; *Thackwell v. Gardiner*, 5 De G. & Sm. 58; *Hodgson v. Hodgson*, 2 Kee. 704; *Humphrey v. Richards*, 2 Jur. N. S. 432); and the power of a married woman to dispose of personal property settled to her separate use extends to interests in reversion, as well as those in possession: *Sturgis v. Corp*, 13 Ves. 190.

Where a married woman making a will has property settled to her separate use to satisfy the words of her will, it will not be held to be made in execution of a special power to which she does not refer: *Evans v. Evans*, 23 Beav. 1. Secus, where the will of a married woman having a general power would, if not held to be in execution of it, be inoperative: *Shelford v. Ackland*, *ib.* 10.

As to real estate, it has always been considered to be clear that when it was settled to the separate use of a feme covert, she had the same power over her *life interest* therein as she would have as a feme sole, and a contract to sell or mortgage her interest has been always specifi-

cally enforced against her: *Stead v. Nelson*, 2 Beav. 245; *Wainright v. Hardisty*, 2 Beav. 363; *Willcocks v. Hannington*, 5 Ir. Ch. Rep. 33; *Blatchford v. Wooley*, 2 Drew. & Sm. 204; 32 L. J. (Ch.) 534. In *Major v. Lansley*, 2 Russ. & My. 357, where a married woman, being entitled for life to her separate use, to a reversionary interest in an annuity charged on real estate, joined with her husband in assigning it, Sir John Leach, M. R., although she had levied no fine, held her bound, after the death of her husband, by the assignment. So, in *Newcomen v. Hassard*, 4 Ir. Ch. Rep. 268, where a married woman and her husband assigned a rent-charge to which she was entitled to her separate use for life, it was held by the Master of the Rolls of Ireland that the deed did not require acknowledgment under the statute for the abolition of fines and recoveries.

It was, however, held by many judges that a feme covert could not by will dispose of real estate settled to her separate use, without an express power of appointment, or by act inter vivos otherwise than by fine or recovery, or since the Fines and Recoveries Act by deed duly executed in conformity with its provisions, so as to disinherit or bind her heir: *Churchill v. Dibben*, 2 Kenyon's Rep., pt. ii. 98, 84; *Anon.* cited in *Peacock v. Monk*, 2 Ves. 380; *Newcomen v. Hassard*, 4 Ir. Ch. Rep. 268, 273, 274; *Harris v. *Mott*, 14 Beav. 169; *Lechmere v. Brotheridge*, 32 Beav. 353.

The result, however, of the recent authorities, establishes as a general proposition that a married woman having real property settled to her separate use in fee, and not restrained from alienation, has as incident to her separate estate, and without any express power, a complete right of alienation by instrument inter vivos (not acknowledged under the Fines and Recoveries Act) or by will. This is expressly decided by Lord Chancellor Westbury in the leading case of *Taylor v. Meads*, 34 L. J. (N. S.) Ch. 203. There a testator by his will (made since 7 Will. 4 and 1 Vict. c. 26), gave real estate to trustees upon trust for E. M., a married woman, her heirs and assigns, and to be conveyed by her to such person as she, notwithstanding her coverture, should direct or appoint by any instrument in writing to be by her signed, sealed, and delivered in the presence of and attested by two or more credible witnesses, and in default for E. M., her heirs and assigns, for her separate use. E. M. devised the estate to her husband by a will, duly executed in conformity with the Wills Act, but not sealed. It was held by Lord Chancellor Westbury, reversing the decision of Sir John Romilly, M. R., upon this point, that the power was not well executed. But his Lordship also held that the equitable fee to which, on default of appointment, she was entitled to her separate use, was well devised by her will. "With regard to the question," said his Lordship, "upon which there has been no decision in the Court below, namely, whether in a case where real estates are conveyed or devised to trustees in fee,

upon trust for the sole and separate use of a married woman and her heirs, she has the same power of disposition by deed or will over the equitable fee, as she would have if she were a feme sole. Can she convey the equitable fee without the necessity for the instrument being acknowledged in the manner required by the statute for the abolition of fines and recoveries? and can she during coverture, devise the equitable estate by a will executed in conformity with the statute?

"There is no difficulty as to the principle. When the Courts of Equity established the doctrine of the separate use of a married woman, and applied it to both real and personal estate, it became necessary to give the married woman, with respect to such separate property, an independent personal status, and to make her in equity a feme sole. It is of the essence of the separate use, that the married woman shall be independent of, and free from the control and interference of her husband. With respect to separate property, the feme covert is, by the form of trust, released *and freed from the fetters and disability [*491] of coverture, and invested with the rights and powers of a person who is *sui juris*. To every estate and interest held by a person who is *sui juris*, the common law attaches a right of alienation, and accordingly the right of a feme covert to dispose of her separate estate was recognized and admitted from the beginning until Lord Thurlow devised the clause against anticipation (see *Parkes v. White*, 11 Ves. 209, 221). But it would be contrary to the whole principle of the doctrine of separate use, to require the consent or the concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of. That would be to make her subject to his control and interference. The whole matter lies between a married woman and her trustees: and the true theory of her alienation is, that any instrument, be it deed or writing, when signed by her, operates as a direction to the trustees to convey or hold the estate according to the new trust which is created by such direction. This is sufficient to convey the feme covert's equitable interest. When the trust thus created is clothed by the trustees with the legal estate, the alienation is complete both at law and in equity.

"With regard to the ordinary equitable estate belonging to a feme covert—for example, where lands are given to trustees in fee upon trust for a married woman and her heirs, or for a single woman in fee, who afterwards marries,—equity follows the law, and, preserving the analogy between legal and equitable estates, requires that the equitable estate of the married woman shall be dealt with *inter vivos* in the same manner as a legal estate; and in like manner an estate of this nature cannot be devised by a feme covert, for the incapacity to make a will of land by the 14th section of the statute of Hen. 8, in this respect, is not removed by 1 Vic. c. 26; but the interest created by the separate use is the creature of a court of equity, to which there is nothing correspondent at law,

and which would be deprived of its character if it were made subject a form of alienation that proceeds upon the basis of the existence of control and interest in the husband, and personal disability in the wife. The violence thus done by courts of equity to the principles and policy of the common law as to the status of the wife during coverture is very remarkable, but the doctrine is established, and must be consistently followed to its legitimate consequences.

"It is right to advert in a few words to the statute law and to the decided cases. By the 14th sect. of the Statute of Wills, 34 & 35 Hen. 8, c. 5, it was enacted that wills or testaments, made of any manor lands, tenements, or other hereditaments, by any *woman [*492] covert, should not be taken to be good or effectual in law. This enactment, no doubt, referred to lands vested in a feme covert in fee simple, and of which her husband was seised jure uxoris. Courts of equity appear to have considered it as not applicable to separate estate, which was unknown at the time of the passing of the statute. Between that time and the act of 1 Vict. c. 26, the doctrine of the separate use was fully established, and the feme covert, when not restrained from alienation, was considered in equity entitled to the same rights of alienation over her separate property as were possessed by persons sui juris. Then followed the present Wills Act, the 1 Vict. c. 26, by which it is enacted that no will made by a married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act. This brings us to the decided cases, in which there is some inconsistency, but they preponderate greatly in favour of the proposition that a feme covert, when not restrained from alienation, has in equity the same jus disponendi over her separate estate by deed or will as she would have if free from the disability of coverture. In addition to *Peacock v. Monk* (2 Ves. 190), and the well-known decision of Lord Thurlow, it is sufficient to refer to *Tullett v. Armstrong* (1 Beav. 1, 4 My. & Cr. 377) and *Baggett v. Meux* (1, Ph. 627), the judgment of Lord Justice Turner in *Atchison v. Le Mann* (33 L. T. 302); and finally to the recent case of *Adams v. Gamble* (12 Ir. Ch. Rep. 102), where the point was expressly determined. From the earlier decisions Lord St. Leonards, in his book on Powers, derived the same conclusions, which he states in these words: 'When a married woman has property settled to her separate use, without any restraint on alienation, she is deemed a feme sole, and may dispose of it accordingly.' I must hold therefore, that a feme covert, not restrained from alienation, has as incident to her separate estate, and without any express power, a complete right of alienation by instrument inter vivos or will."

In *Hall v. Waterhouse*, 5 Giff. 64, 13 W. R. (V. C. S.) 666, 11 Jur. N. S. 361, Sir John Stuart, V. C., decided that a married woman to whom the legal fee of real estate had been devised to her separate use,

without the intervention of trustees, might dispose of the equitable fee by her will during coverture in the same way as if she were a feme sole. See also *Pride v. Bubb*, 7 L. R. Ch. App. 64.

Of course, where real property is given absolutely to a married woman, but the gift thereof to her separate use extends merely to her life interest, and not to the corpus of the estate, a devise by her of such real property will be *invalid: *Troutbeck v. Boughey*, 2 L. R. Eq. 534. [*493]

It may be here mentioned that where by an instrument executed before the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), real property is settled to the use of a married woman for life, for her separate use, with remainder over in tail, she is, under the 24th section of the act, the sole protector of the settlement, and her husband's consent is not requisite under the 34th section, to enable the tenant in tail to make an absolute disposition of the property: *Keer v. Brown*, Johns. 138.

Upon the principle that a married woman can dispose of her separate property, she will render it liable by concurring with her trustees in a breach of trust (*Crosby v. Church*, 3 Beav. 485; *Brewer v. Swirles*, 2 Sm. & G. 219; *Hanchett v. Briscoe*, 22 Beav. 496; *Mant v. Leith*, 15 Beav. 524), unless she is restrained from anticipation: *Davies v. Hodgson*, 25 Beav. 186.

So likewise it has been decided that a wife's property settled to her separate use, is applicable to make good a loss occasioned by her own breach of trust, in making away with other property under the trust: *Clive v. Carew*, 1 J. & H. 199; and the arrears of income under the same trust, though settled to her separate use without power of anticipation, are also liable (*Pemberton v. M'Gill*, 1 Drew. & Sm. 266); but the *future income of property* so settled is not so liable during her coverture. See *Clive v. Carew*, 1 J. & H. 199; *Pemberton v. M'Gill*, 1 Drew. & Sm. 266; *Jackson v. Hobhouse*, 2 Mer. 488; and see the note to *Brice v. Stokes*, Vol. 2, as to effect of acquiescence in a breach of trust; and see *Mara v. Manning*, post, 511, as to the liability of her contingent interests.

Lord Thurlow, in *Hulme v. Tenant*, following the opinion that at one time was prevalent, thought that trustees were essentially necessary to the existence of separate property. It has, however, been long since established, that, if real or personal estate be given to or settled upon a married woman for her separate use, without the interposition of trustees, still, in equity, the intention will be effectuated, and the wife's interest protected by the conversion of her husband into a trustee for her (*Bennett v. Davis*, 2 P. Wms. 316; *Parker v. Brooke*, 9 Ves. 583; *Rich v. Cockle*, 9 Ves. 375; *Rollfe v. Budder*, Bumb. 187; *Prichard v. Ames*, 1 T. & R. 222; *Newlands v. Paynter*, 10 Sim. 377; 4 My. & C. 408; *Archer v. Rorke*, 7 Ir. Eq. Rep. 478; *Gardner v. Gardner*, 1 Giff. 126); and where there are trustees (notwithstanding the decision of Lord

Rosslyn, in *Whistler v. Newman*, 4 Ves. 129; and *Mores v. Huish*, 5 Ves. 692), it is now clear, that a married woman can bind her separate property, without their *assent, unless it is rendered necessary [*494] by the instrument giving her that property. See *Essex v. Atkins*, 14 Ves. 542, where the grant of an annuity by a married woman out of her personal property settled to her separate use was established, without the assent of the trustees. See also, *Grigby v. Cox*, 1 Ves. 518; *Pybus v. Smith*, 1 Ves. jun. 193; and *Parkes v. White*, 11 Ves. 223. The cases of *Whistler v. Newman*, and *Mores v. Huish* may, therefore, be considered as overruled. Indeed, it has been held that, where a trustee has received notice of a charge made by a married woman on her separate property, in his hands, he will be held personally liable for payments subsequently made to her: *Hodgson v. Hodgson*, 2 Kee. 704.

A married woman may give to her husband the same interest in her separate property, as she can to any other person (*Essex v. Atkins*, 14 Ves. 542; *Grigby v. Cox*, 1 Ves. 518; *Gardner v. Gardner*, 1 Giff. 126); but where it consists of a fund in court, it will not be paid to her husband, unless her consent is taken in court: *Milnes v. Busk*, 2 Ves. jun. 488, 500; *Wordsworth v. Dayrell*, 4 W. R. 689.

A husband may also give property to trustees, or make himself a trustee for the separate use of his wife. But in order to constitute a gift between husband and wife there must be a clear irrevocable gift to a trustee for the wife, or some clear and distinct act of the husband, by which he divested himself of his property, and engaged to hold it as a trustee for the separate use of his wife. See *Mews v. Mews*, 15 Beav. 529; there a farmer's wife, with his knowledge and sanction, deposited the produce of the surplus butter, eggs and poultry, with a firm in her own name, and he called it "her money." On his death-bed he gave his executor directions to remove the money, and do the best he could with it for his wife. It was held by Sir John Romilly, M. R., that the evidence was not sufficient to establish a gift between them, and that the husband had neither made himself nor the firm trustees for his wife. See also *Barrack v. M'Culloch*, 3 K. & J. 110; *Grant v. Grant*, 34 Beav. 623; 13 W. R. (M. R.) 1057.

Although a parol agreement before marriage that particular chattels of the wife shall be possessed by her for her separate use, is not binding upon the husband; yet, if the agreement be acted upon by the chattels being placed under dominion of the trustees and treated as separate property, the agreement may be made effectual: *Simmons v. Simmons*, 6 Hare, 352.

As to a married woman's power of disposition, where she takes only a partial interest, to her separate use, with a power of appointing the capital.—When *a wife takes an express estate for life in a [*495] fund for her separate use, with power to appoint the principal

after her death, in such instances the wife can only dispose of the capital by an execution of her power, which may be immediate, if the power authorize a deed; but if it require the appointment to be made by will only, the disposition cannot take effect till after the appointor's death, and the wife is precluded from making 'an immediate' disposal of the fund: 2 Bright, H. & W. 235, and see *Bradly v. Westcott*, 13 Ves. 445, 451; *O'Keate v. Calthorpe*, 8 Ves. 117 cited; *Reid v. Shergold*, 10 Ves. 370, 380; *Anderson v. Dawson*, 15 Ves. 532; *Sockett v. Wray*, 4 Bro. C. C. 483. And the better opinion seems to be that the execution of the power is requisite during coverture, although the ultimate limitation may be to the wife, her executors, administrators and assigns: 2 Bright, H. & W. 235, and see *Heatley v. Thomas*, 15 Ves. 597; *Sockett v. Wray*, 4 Bro. 483; *Richards v. Chambers*, 10 Ves. 118; *Lee v. Muggeridge*, 1 V. & B. 118; *Nixon v. Nixon*, 2 J. & L. 416.

But where real property was given to trustees upon trust for a married woman, her heirs and assigns, with a special power of appointment to her, and an ultimate limitation to *her separate use* in fee, it was held, that the special power of appointment did not derogate from the right of disposition incident to ownership, and that she might consequently dispose of the property by will. *Taylor v. Meads*, 34 L. J. (N. S.) Ch. 203.

Although a man having a general power of appointment over property, which in default of appointment goes to others, by exercising his appointment, renders the appointed property assets for payment of his debts (*Jenney v. Andrews*, 6 Madd. 264; and see note to *Silk v. Prime*, vol. ii., post), as a general rule, if a married woman exercises such a power, although having a life estate to her separate use, the appointed property will not be applicable to the payment of debts which she may have contracted as a feme sole: *Vaughan v. Vanderstegen*, 2 Drew. 165; *Hobday v. Peters*, 28 Beav. 354, 356; *Blatchford v. Woolley*, 2 Drew. & Sm. 204; *Shattock v. Shattock*, 2 L. R. Eq. 182; 35 Beav. 489.

But if there is any fraud on the part of the married woman, if she has misled persons with whom she has had dealings, as for instance by holding herself out to be an unmarried woman, that will alter the nature of the transaction and make the property liable (*Vaughan v. Vanderstegen*, 2 Drew. 363). But this principle was held not to be applicable to a case where a married woman professed to mortgage property to an extent beyond that which she had the power of doing, the mortgagee being cognizant of all the facts. *Hobday v. Peters*, 28 Beav. 354.

*Where, however, the limitation though in the form of a power gives the wife the absolute interest, she may dispose of [*496] the fund without exercising the special power. 2 Bright, H. & W. 242.

Liability of wife's separate estate to her debts and general contracts

not referring to it.—In the cases before mentioned, the married woman had acted with respect to her separate property, and thus shown her intention to deal with it.

The point decided by *Hulme v. Tenant* goes much farther than that, and shows that her separate property will be bound by *general engagements in writing* which do not refer to, or make mention of it. It has accordingly been frequently held, that the separate estate of a feme covert is rendered liable to pay her bond (*Lillia v. Airey*, 1 Ves. jun. 277; *Norton v. Turvil*, 2 P. Wms. 144; *Peacock v. Monk*, 2 Ves. 193); although it be given to her husband, or although she have joined in it with him, as in *Hulme v. Tenant*; *La Touche v. La Touche*, 3 H. & C. 576; or with a stranger: *Heatley v. Thomas*, 16 Ves. 596; *Standford v. Marshall*, 2 Atk. 68. The same has been held as to a bill of exchange accepted (*Stuart v. Lord Kirkwall*, 3 Madd. 387; and *Owen v. Homan*, 4 H. L. Cas. 997;) or endorsed *M'Henry v. Davies*, 6 L. R. Eq. 462; 10 L. R. Eq. 88) by a feme covert, and as to a promissory note given by a feme covert in *Bullpin v. Clarke*, 17 Ves. 365; *Field v. Sowle*, 4 Russ. 112; and the separate estate of a feme covert has been held to be bound by an agreement entered into by her without the knowledge of her husband, to pay an additional rent for a house: *Master v. Fuller*, 4 Bro. C. C. 19, 1 Ves. jun. 513. So on an agreement to take a house for a term of years, payment of the past rents was enforced as a charge upon her separate estate. *Gaston v. Frankum*, De G. & Sm. 561; 16 Jur. 507. And in *Murray v. Barlee*, 3 My. & K. 210, it was held, by Lord Brougham, overruling the decision of Sir L. Shadwell, V. C., that the separate property of a feme covert was liable to the payment of the costs of solicitors, whom she had by various letters instructed to act on her behalf with respect to it, promising or giving them to understand that she would pay the costs and charges to become due to them, for business done for her, although she did not refer to her separate property, or expressly promise to pay such costs and charges out of it. "The present," observes his Lordship, "is by no means a case of mere general charge. If it were, I have no doubt that the claim would well lie, but these are written promises. I hold a retainer in writing to imply a promise to pay whatever shall be reasonably and lawfully demanded by the solicitor or attorney acting under that retainer. *So, if there be no formal retainer, but only a writ- [*497] ten acknowledgment or adoption of the professional conduct, or instructions in writing to proceed further, the party who gives such written instructions, in effect promises to pay whatever may lawfully become due to one acting in obedience to them; that is, to pay the costs which shall be taxed."

In the case of *Barlee v. Barlee*, 1 S. & S. 100, it was held that the separate property of a married woman, in the hands of the Court, was liable to the costs of a suit instituted by her touching that property.

Where, however, a married woman whose husband was insane, instructed a solicitor to act for her and her infant children, appearing by their next friend, in a suit to which she was not a party, and which did not relate to her separate estate, it was held by Sir John Romilly, M. R., that her separate estate was not liable for the costs. "There has been," said his Honor, "a misconception of the rights and obligations attaching to the separate estate of a married woman. In *Murray v. Barlee*, 3 My. & K. 209, a married woman, in respect of her separate estate, employed a solicitor to conduct the proceedings, and it was held that her separate estate was made liable. That is no authority for creating a liability for costs in this case. Here, a married woman, whose husband, by reason of mental incapacity, was unable to take any steps, goes to a solicitor and directs him to take proceedings for her children. It is a separate and distinct matter. She was not a party to the cause, and the litigation had no relation to her or her separate estate; it was instituted merely to ascertain the rights of her children. From the situation of her husband, she was the person who naturally communicated with the solicitor, and in one sense employed him, but he knew that he was employed to protect the interests of the children, and that the next friend was liable to him; but neither the mother of the children, nor her separate estate, was liable for costs incurred in this matter which did not concern her." *Re Pugh*, 17 Beav. 336.

When a solicitor has been employed on behalf of a husband and wife in respect of the wife's separate estate, in the absence of a special contract, the husband is liable to the solicitor: *Wright v. Chard*, 4 Drew. 702, 703.

An application by a married woman to tax a solicitor's bill, for business in respect to her separate estate, must be made by her by next friend: *In re Waugh*, 15 Beav. 508. Pending a reference for the taxation of a solicitor's bill against a married woman, the solicitor cannot maintain a suit to enforce a lien for his bill of costs on her separate estate: *Waugh v. Waddell*, 16 Beav. 521.

In many cases it has been erroneously *held, that the general engagements of a married woman, in writing, operate and are valid only as appointments made with reference to the separate estate, and not as mere contracts; and consequently, as a mere verbal contract cannot operate as an appointment, that the separate estate of a feme covert is not bound by her general engagements unless they are in writing. See *Clerk v. Miller*, 2 Atk. 379; *Dowling v. Maguire*, Ll. & G. Rep. t. Plunkett, 19; *Bolton v. Williams*, 2 Ves. jun. 142; *Greatley v. Noble*, 3 Madd. 94; *Stuart v. Kirkwall*, 3 Madd. 389; *Aguilar v. Aguilar*, 5 Madd. 418; *Chester v. Platt*, 1 V. & B. 334; *Murray v. Barlee*, 4 Sim. 82, per Sir L. Shadwell, V. C. The more recent cases, however, upon the authority of the principal case, decide that a feme covert can, as to her separate estate, enter into contracts in the same

manner as a feme sole, and that her contracts or engagements, upon this principle, are equally binding whether they are written or merely verbal, and that it is therefore unnecessary, as well as incorrect in principle, to speak of her written engagements as operating merely as appointments. See *Murray v. Barlee*, 3 My. & K. 223; *Owens v. Dickenson*, 1 Cr. & Ph. 53; *Master v. Fuller*, 4 Bro. C. C. 19. *Sed vide Shattock v. Shattock*, 2 L. R. Eq. 182. This doctrine has been most ably supported in Lord Brougham's elaborate judgment in *Murray v. Barlee*, 3 My. & K. 223. "In all these cases," says his Lordship, "I take the foundation of the doctrine to be this: the wife has a separate estate, subject to her own control, and exempt from all other interference or authority. If she cannot effect it, no one can; and the very object of the settlement which vests it in her exclusively, is to enable her to deal with it as if she were discover. The power to affect it being unquestionable, the only doubt that can arise is, whether or not she has validly encumbered it. At first, the Court seems to have supposed that nothing could touch it but some real charge, as a mortgage, or an instrument amounting to an execution of a power, where that view was supported by the nature of the settlement. But afterwards her intention was more regarded, and the Court only required to be satisfied that she intended to deal with her separate property. When she appeared to have done so, the Court held her to have charged it, and made the trustees answer the demand thus created against it. A good deal of the nicety that attends the doctrine of powers thus came to be imported into this consideration of the subject. If the wife did any act directly charging the separate estate, no doubt could exist; just as an instrument expressing to be in execution of a power, was [499] always, of course, considered as made in execution of it. But so, if by any reference to the estate, it could be gathered that such was her intent, the same conclusion followed. Thus, if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a feme covert, without any reference to her separate estate, it was held, in the cases I have above cited, that she must be intended to have designed a charge on that estate, since in no other way could the instrument thus made by her have any validity or operation; in the same manner as an instrument, which can mean nothing if it means not to execute a power, has been held to be made in execution of that power, though no direct reference is made to the power. Such is the principle. But doubts have been, in one or two instances, expressed as to the effect of any dealing, whereby a general engagement only is raised; that is, where she becomes indebted without executing any written instrument at all. This point was discussed in *Grealley v. Noble*, 3 Madd. 79; and the Master of the Rolls (Sir John Leach) appears, in the subsequent case of *Stuart v. Kirkwall*, 3 Madd. 387, to have been of opinion that the wife's separate es-

tate was not liable without a charge, and to have supposed that he had before stated that opinion in *Greatley v. Noble*, though he by no means expressed himself so strongly in disposing of that case, and distinctly abstained from deciding the point. I own I can perceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife is in equity taken as a feme sole, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or, more properly, her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the Statute of Frauds, and to require writing, where that act requires none? Is there any equity, reaching written dealings with the property, which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle. But one of the earlier cases, *Kenge v. Delevall*, 1 Vern. 326, makes no mention of such a distinction, for there, being indebted generally is all that is stated as grounding the claim; and in *Lillia v. Airey*, 1 Ves. jun. 277, the party who had furnished necessary supplies to the wife, was held entitled to recover to the extent of her separate maintenance. She had, it is true, given a bond, but only for 60*l.*; *the Court, however, held the creditor entitled to a larger [*500] sum, the separate maintenance exceeding the amount of the bond."

So also, in *Owens v. Dickenson*, Cr. & Ph. 53, Lord Cottenham, with reference to a written agreement, observed, "that within the authority of cases which have been decided, it would have been operative upon the feme covert's separate estate, but not by way of the execution of a power, although that has been an expression sometimes used, and, as I apprehend, very inaccurately used, in cases where the Court has enforced the contracts of married women against their separate estate. It cannot be an execution of the power, because it neither refers to the power nor to the subject-matter of the power, nor, indeed, in many of the cases has there been any power existing at all. Besides, as it was argued in *Murray v. Barlee*, if a married woman enters into several agreements of this sort, and all the parties come to have satisfaction out of her separate estate, they are paid *pari passu*, whereas if the instruments took effect as appointments under a power, they would rank according to the priorities of their dates. It is quite clear, therefore, that there is nothing in such a transaction which has any resemblance to the execution of a power; what it is, it is not easy to define. It has sometimes been treated as a disposing of the particular estate; but the contract is silent as to the separate estate, for a promissory note is merely a contract to pay, not saying out of what it is to

that the consideration money could not be recovered out of her separate estate. "It is very difficult," said Lord Eldon, in his judgment "to maintain, that, where her intention was not to contract a personal debt, or to charge a gross sum upon her separate estate, but the contract was for an annuity, which contract the party dealing with her had it in his power to make effectual, and such as to bind her according to the intention of both, and he failed in that, a Court of equity ought to assist him, and to give him such a charge as she did not intend to give or he intend to have."

[*503] *In the case of *Callow v. Howle*, 1 De G. & Sm. 531, a solicitor of the husband and wife having transacted business relating to the separate estate of the wife, instituted a suit against them and the trustees of the settlement, for payment of his bill of costs out of the wife's separate estate. It did not appear that the wife had, either in writing or verbally, charged her separate property, or expressly contracted or promised to pay the debt out of her separate estate or otherwise. It was held by Sir J. L. Knight Bruce, V. C., that the separate estate was not directly liable. "The question is not before me," said his Honor, "whether the trustees are personally liable; or whether, if the trustees paid the solicitor's bill of costs, they would be entitled to retain the amount out of the rents and profits to which the lady was entitled for her separate use. The question before me is, whether the solicitor in respect of this most just demand against some persons or person, has a direct right to resort to the separate property. . . . The case against the separate property is put upon the *implied contract*, supposed to arise from the nature of the business done, because it has been done mainly in respect of the separate estate. . . . In my judgment, the mere circumstance of the business being done relating to the separate property of a married woman, vested in trustees, is insufficient to make that separate property directly liable to the attorney for expenses incurred with reference to it. The trustees may be liable, or some other person may be liable, but it does not appear to me to follow that the separate property of the wife is directly liable, or that she is liable in respect of the property."

So in *Wright v. Chard*, 4 Drew. 673, 1 De G. F. & Jo. 567, where a married woman received from the trustee rents of an estate to which she claimed to be entitled as her separate property, but it turned out that she was not entitled, the Court refused to give relief to the real owner against her other separate estate. See also *Johnson v. Gallagher*, 3 De G. F. & Jo. 513; *Shattock v. Shattock*, 2 L. R. Eq. 182.

Although the husband have no property out of which to pay his own debts, or to maintain himself or his family by his wife, he will not be able to claim any contribution for such purposes out of the separate estate of his wife, even if she may have eloped from him. See *Hodgens v. Hodgens*, 4 C. & F. 323, 373, where Lord Cottenham, C., observed:

"The children may want the necessities of life, they may want the proper means of education; the law does not throw on the mother the duty, the legal obligation (the moral obligation we have nothing to do with here) of maintaining, educating, or providing for the children."

*See *S. C.*, Ll. & G., t. Sugd. 299; Ll. & G. t. Plunk. 137, 148; [*504] 11 Bligh. N. S. 62; and see *Lumb v. Milnes*, 5 Ves. 520.

Now, however, by 45 sect. of 20 & 21 Vict. c. 85 (the Divorce and Matrimonial Causes Act), it is enacted, that "in any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made to appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them." See *Milne v. Milne and Fowler*, 2 L. R. P. & D. 295; *Stone v. Stone and Brownrigg*, 3 Sw. & Tr. 372, 33 L. J. (P. M. & A.) 95; *Sykes v. Sykes and Smith*, 2 L. R. P. & D. 163.

And now, under 33 & 34 Vict. c. 93, a married woman having separate property, is liable to the parish for the maintenance of her husband (sect. 13), and of her children, but so as not to relieve her husband from his liability to maintain them (sect. 14). And see post, p. 537.

Although the wife has separate property of her own, she may during the lunacy of her husband pledge his credit for her own maintenance, and her husband, by his estate, will be liable: *Davidson v. Wood*, 11 W. R. (V. C. W.) 561; *Ib.* (L. J.) 791.

Where, however, a married woman, having separate property, is a lunatic, an allowance will be made to the husband for the extraordinary expenses occasioned by her malady, if he be in poor circumstances and unable to meet them: *Edwards v. Abrey*, 2 Ph. 37. And though the Court might not reimburse the husband for what he had actually paid for her maintenance (*Ib.* 38), the case might be different where money was still due to parties who had the care of her: *Ib.* 38; and see *Brodie v. Barry*, 2 V. & B. 36; and see *In re Baker's Trusts*, 13 L. R. Eq. 168, where the accrued dividends on a fund settled to the separate use of a married woman, who had for many years been an inmate of a pauper lunatic asylum in the colony of Victoria, Australia, were ordered to be paid to the Colonial Master in Lunacy towards the payment of expenses incurred for past maintenance; and the future dividends on the same funds were ordered to be paid to the same Master in Lunacy, he being, on the construction of the colonial statute, the committee of the lunatic's estate.

And even if the husband were of ability to maintain his wife under such circumstances, the Court might expend part of her separate income

[*505] for such purposes; "for," said a learned judge, "if a *commission was taken out, I must look at the substantial benefit of the object of it, and must consider the extent, not only of the husband's means, but of his obligation to maintain her; and if the law would not compel him to contribute to her comfort in the degree in which he ought, I should not scruple to direct the committee to apply a part of her separate income:" *Brodie v. Barry*, 2 V. & B. 39. See, also, *Nettle-ship v. Nettle-ship*, 10 Sim. 236: see, also, *Re Evans*, Shelf. on Lunacy, 2nd ed. 204, and *Peters v. Grote*, 7 Sim. 238, as to the application of part of the capital belonging to a married woman, a lunatic, and deserted by her husband, for her maintenance.

And where the husband has paid off a mortgage upon the separate estate of his wife, he can charge it to the extent of the mortgage; *Nelson v. Booth*, 5 W. R. 722.

A married woman having shares in a joint-stock company, which are agreed to be settled to her separate use, is liable, so far as her separate estate is concerned, as a contributory, but her husband is not so liable: *Ex parte Luard*, 8 W. R. (V. C. K.) 73.

So where a married woman, having separate estate, contracted to take shares in her own name in a joint-stock company, which she paid for out of her separate estate, the company being afterwards wound up, it was held by Sir R. T. Kindersley, V. C., that as the deed of settlement did not exclude married women from being shareholders so as to bind their separate estate, she ought to be placed on the list of contributories in her own right, so as to bind her separate estate. "If," said his Honor, "a married woman, having separate estate, can contract with another person so as to render that separate estate liable, there seems to be no reason why she may not in like manner contract with a joint-stock company; and if she may so contract to purchase a horse or a jewel, or any other chattel, there is surely no reason why she may not equally contract to buy shares in the company for her own separate use. And if she may thus purchase shares, she may of course stand as a shareholder on the register (supposing there is nothing in the company's deed to prevent it), so as to make her separate estate liable in respect thereof; and, if that is so, there is no reason why she should not be placed in like manner on the list of the contributories:" *Mrs. Matthewman's case*, 3 L. R. Eq. 781.

Of the receipt by the husband of the separate property of wife.—Where property is settled to the separate use of a married woman, it is clear that if she expressly authorises the money to be paid to her husband, he is entitled to receive it, and she can never recall it (per Lord [*506] Cottenham, C., in *Caton v. Rideout*, 1 Mac. & G. 601); and it seems also to be now well established, that where a wife tacitly permits, as well as where she expressly authorises, her husband to receive the income of her separate property, especially if the husband



continues to receive it for a great number of years, and it is applied for the benefit of the family, she cannot claim any reimbursement out of his estate: *Christmas v. Christmas*, Sel. Ch. Ca. 20; *Powell v. Hankey*, 2 P. Wms. 82; *Pawlet v. Delavall*, 2 Ves. 663; *Squire v. Dean*, 4 Bro. C. C. 326; *Milnes v. Busk*, 2 Ves. jun. 488; *Smith v. Camelford*, 2 Ves. jun. 698, 716; *Beresford v. Archbishop of Armagh*, 13 Sim. 643; *Bartlett v. Gillard*, 3 Russ. 149; *Carter v. Anderson*, 3 Sim. 370; *Arthur v. Arthur*, 11 Ir. Eq. Rep. 511; *Rowley v. Unwin*, 2 K. & J. 138; *Corballis v. Grainger*, 4 Ir. Ch. Rep. 173; *Hughes v. Wells*, 9 Hare, 749; *Payne v. Little*, 26 Beav. 1; and see *Caton v. Rideout*, 1 Mac. & G. 529, where Lord Cottenham, C., held that the fact that the husband, who, with his wife's concurrence, received the income of her separate estate, was one of the trustees, was immaterial, as it appeared upon the evidence that payment was made to the husband as husband, and not as trustee. "Having," said his Lordship, "come to this conclusion upon the evidence, the result is that the rule, that separate money of the wife paid to the husband with her concurrence, or by her direct authority, must be applied to the present case." In commenting upon the inconvenience of not following the rule, he added: "If I were to hold the contrary, I do not know to what extent such a decision would go. In ninety-nine cases out of a hundred, separate property, which is introduced as a protection to the wife, does not take effect; all things going right, and no distinction being made, the question of separate property does not arise: the property is used as a common fund for the benefit of the family, and, in that way, naturally falls under the control and management of the husband. If, however, it be once assumed that the wife by herself, or by those who represent her, may call upon the estate of the husband, or the husband himself, to repay the money, so far as they can trace it, it is impossible to tell what confusion might not be introduced into a family; for the wife might say that certain stock had been bought with her property, even where there was positive proof of an appointment by her in favour of her husband. The practice between the husband and wife is proper evidence to show acquiescence and concurrence."

The rule that the arrears of the wife's separate estate cannot be recovered as against the husband being founded on the presumption that it has been applied to the maintenance of the wife or to the *general purposes of the family, with the assent of the wife, [*507] does not, it seems, apply where there is a receiver over the property liable to pay it, nor has it any application against a purchaser for valuable consideration: *Foss v. Foss*, 15 Ir. Ch. Rep. 215.

In some cases, however, the husband has been obliged to account for one year's receipts; see cases cited in note to *Ex parte Elder*, 2 Madd. 286; and *Howard v. Digby*, 2 C. & F. 643; 8 Bligh. N. S. 224, and the comments upon it, Sugd. Prop. 162, *Arthur v. Arthur*, 11 Ir. Eq. Rep.

513; *Lee v. Grundy*, 1 Jur. N. S. 953; *In re Kirwan*, 1 Ir. R. Eq. 553; and see cases cited in note to *Payne v. Little*, 26 Beav. 1.

Where the wife has neither expressly nor by tacit acquiescence authorized her husband to receive the income, she will be entitled to reimbursement out of his estate (*Parker v. Brooke*, 9 Ves. 583); but where the consent of the wife to her husband receiving the income of her separate estate could not be presumed, on account of her lunacy, an allowance was made to the husband of a proper sum, for what he had expended in her support: *Attorney-General v. Parnter*, 3 Bro. C. C. 441.

The wife may by her acts, without any express gift, show that it was her intention that he should have the control of her separate property without liability to account: *Gardner v. Gardner*, 1 Giff. 126.

But when the husband has received, with the consent of his wife, the capital or savings of her separate property, and it is shown that he received them for her use, he is liable to an account. Thus, in *Darkin v. Darkin*, 17 Beav. 578, two promissory notes and a gas share, were left to a feme sole for her separate use. She married, but they were not settled, and they were subsequently transferred into the name of the husband. Since, however, it appeared from a book of account kept by the husband, that he had received the dividends and interest for the use of the wife, it was held by Sir John Romilly, M. R., that after the husband's death they belonged to his wife as her separate estate. "The two promissory notes and the gas share," said his Honor, "were her separate property. They were transferred to the husband with the assent of the wife; and if he had continued to receive the dividends, then, according to *Caton v. Rideout*, it might be inferred that the wife knew the manner in which they were to be applied, and had agreed that the husband should receive them for his own use and benefit. But this objection is met by the production of the book account in the handwriting of the husband, who acknowledges that the dividends and interest were received for the benefit of his wife; and, in 1841,

[*508] *the wife signs the book as having received the dividends herself. In this state of the case it appears to me that I must consider the book evidence. And although the dividends were received by the husband with the sanction of his wife, yet that they were received for her. There is evidence of a trust in writing, and it is therefore unnecessary to resort to the principle laid down in *Rich v. Cockell*, (9 Ves. 369), that the burthen of proof in such a case lies on the husband."

And the savings of the wife not given by her to the husband may be followed if invested in his name in real estate. Thus, in *Darkin v. Darkin*, 17 Beav. 578, the savings of a wife's separate estate were invested in the joint names of the husband and wife. Afterwards the fund was applied in the purchase of real estate, which was conveyed to her husband absolutely to uses to bar dower. After the death of the

husband, it being established by the evidence that the husband was to enjoy the property for life, and that it should afterwards belong to the survivor, it was held by Sir John Romilly, M. R., that the devisee of the estate was a trustee for the wife. See *Rowe v. Rowe*, 2 De G. & Sm. 294; *Barrack v. M'Culloch*, 3 K. & J. 110; *Scales v. Baker*, 28 Beav. 91; and see and consider *Hughes v. Wells*, 9 Hare, 749.

When a married woman advances a sum of money to her husband out of her separate estate by way of loan, she can prove as a creditor against his estate in an administration suit: *Woodward v. Woodward*, 11 W. R. (L. C.) 1007.

Where the evidence of a married woman, a plaintiff in a suit, seeking to make her husband account for part of her separate estate received by him as tendered in support of her case against her husband, it was held by Sir J. Parker, V. C., that the 14th & 15th Vict. c. 94, did not take away the incapacity to give evidence between the husband and wife, and the evidence was rejected. For the same reason, the evidence of the husband, a defendant, against his wife, was rejected: *Alcock v. Alcock*, 5 De G. & Sm. 761. Such evidence is however now admissible under 16 & 17 Vict. c. 83.

As to the relief afforded against a married woman having separate estate in respect of her contracts, &c.—The Court can make no personal decree against a married woman, but can affect her separate estate only: *Francis v. Wigzell*, 1 Madd. 264.

The extent of the relief afforded by equity against the separate estate of a feme covert cannot be more correctly laid down than by Lord Thurlow, in *Hulme v. Tenant*. "Determined cases," observes his Lordship, "seem to go thus far, that the general engagement* of the wife shall operate upon her *personal property*, shall apply to [*509] the *rents and profits of her real estate*, and that her trustees shall be obliged to apply *personal estate*, and *rents and profits when they arise*, to the satisfaction of such general engagement; but this Court has not used any direct process against the separate estate of the wife; and the manner of coming at the separate property of the wife has been by decree, to bind the trustees as to personal estate in their hands, or rents and profits, according to the exigency of justice, or of the engagement of the wife, to be carried into execution. . . . I know of no case where the *general engagement* of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make *conveyance of that real estate*, and by *sale, mortgage*, or otherwise, raise the money to satisfy that *general engagement* on the part of the wife. See, also, *Standford v. Marshall*, 2 Atk. 68; *Murray v. Barlee*, 4 Sim. 82; *S. C.*, 3 My. & K. 209; *Field v. Sowle*, 4 Russ. 112; *Nantes v. Corrock*, 9 Ves. 189; *Bullpin v. Clarke*, 17 Ves. 365; *Jones v. Harris*, 9 Ves. 492, 493, 498; *Stuart v. Lord Kirkwall*, 3 Madd. 387; *Aylett v. Ashton*, 1 My. & Cr. 105, 112; *Francis v. Wig-*

zell, 1 Madd. 258. In *Nantes v. Corrock*, 9 Ves. 189, Lord Eldon refused to hold stock of a feme covert bound, upon the ground, that stock was not liable to execution. See, however, now, 1 & 2 Vict. c. 110, s. 11, which renders stock liable to execution.

Where there is a clause against anticipation, attached to a trust for the separate use of a married woman, if she incurs a debt, as, for instance, by giving a promissory note, the creditor will not have a right to be paid, save out of the arrears of interest actually due on the separate estate, when the debt was contracted: *Fitzgibbon v. Blake*, 3 Ir. Ch. Rep. 328, 330.

At common law, the husband, *during* coverture, is liable to be sued jointly with the wife in respect of debts contracted by the wife *dum sola*, because at common law he takes all her property (*Adair v. Shaw*, 1 S. & L. 263); and it has been held where the husband and wife were taken in execution, if there was no collusion between the husband and the plaintiff, the wife ought to be detained if she had separate estate; but if she had no separate estate, she would ordinarily be discharged: *Sparkes v. Bell*, 8 B. & C. 1; *Newton v. Roe*, 7 Man. & Gr. 329; *Evans v. Chester*, 2 M. & W. 847; *Evans v. Morgan*, 2 Cr. & Jr. 453; *Larkin v. Marshall*, 4 Exch. 806; *Edwards v. Martyn*, 17 Q. B. 693, 700; *Ivens v. Butler*, 3 Jur. N. S. 394; 26 L. J. N. S. (Q. B.) 145.

But if no action was brought during the coverture, and the wife survived, she remained just as liable for the debt as she was *before marriage (*Chubb v. Stretch*, 9 L. R. Eq. 559; per Sir R. Malins, V. C.). But if an action were brought and judgment recovered against the husband and wife during her coverture, and the husband became bankrupt and obtained his discharge, the liability of the husband and the wife for the wife's debt was gone at law: *Lockwood v. Saller*, 5 B. & Ad. 303; *Miles v. Williams*, 1 P. Wms. 249, 257, but the wife's separate estate will remain liable in equity to satisfy her debts. See *Biscoe v. Kennedy*, 1 Bro. C. C. 17 n. ante p. 483 n.; *Chubb v. Stretch*, 9 L. R. Eq. 560, where Sir R. Malins, V. C., puts the matter in a very clear light. "There is no question," said his Honor, "that debts incurred by a married woman may be enforced against her separate estate. It is also perfectly clear that if a man by a marriage settlement reserves a life interest for himself in the settled property, that life interest is liable to his creditors. Why should not the same rule apply to a woman? I think that upon every principle of justice, if a woman reserves a separate interest it should remain liable to her creditors." Now, however, by the Married Woman's Property Act, 1871, a husband married after the Act came into operation (9th August, 1870) is not liable for the debts of his wife contracted before marriage, and the wife is liable to be sued for, and any property belonging to her for her separate use is liable to satisfy such debts, as if she had continued unmarried (sect. 12), and see post, p. 536.

A bill filed against a feme covert, in order to affect her separate estate, will not be defeated by the subsequent death of her husband, although the separate use then ceases (*Field v. Sowle*, 4 Russ. 112; *Nail v. Punter*, 4 Sim. 555); and it may be filed after his death: *Heatley v. Thomas*, 15 Ves. 596; *Kenge v. Delavall*, 1 Vern. 326; *Johnson v. Gallagher*, 3 De G. F. & Jo. 513, 30 L. J. N. S. (Ch.) 298.

After the death of a feme covert, having separate property, creditors may file a bill for payment of their debts (*Owens v. Dickenson*, 1 Cr. & Ph. 48; *Gregory v. Lockyer*, 6 Madd. 90); and her specialty debts, as debts by bond, will not have priority over her simple contract debts, but must both be paid *pari passu*: *Anon.*, 18 Ves. 258; *Owens v. Dickenson*, 1 Cr. & Ph. 53; but see *Shattock v. Shattock*, 2 L. R. Eq. 182, 35 Beav. 489; in other respects, if she has left a will, her estate will be administered according to the ordinary rules in creditors' suits: *Owens v. Dickenson*, 1 Cr. & Ph. 56; *Norton v. Turvill*, 2 P. Wms. 144.

The separate estate of a married woman is liable for a breach of trust by her; but an administrator, *ad litem*, will not sufficiently represent her estate in order that the Court may determine *the extent [*511] of her liability: *Shipton v. Rawlins*, 4 De G. & Sm. 477; and see *Davies v. Hodgson*, 25 Beav. 177. See ante, p. 493.

In *Mara v. Manning*, 2 J. & L. 34, a fund was settled on a husband until his insolvency, and then to the separate use of the wife: the trustee at the solicitation of the wife committed a breach of trust by lending part of the fund to the husband, who became insolvent. The wife claimed the whole fund. Sir E. Sugden decided that the contingent interest of the wife for her separate use was not bound to make good to the trustees the money advanced by them at her request, but his Lordship reserved the question whether her life interest, after the decease of her husband, was so bound; and in *Bestall v. Bunbury*, 13 Ir. Ch. Rep. 318, following *Mara v. Manning*, it was held, that a married woman cannot dispose of an interest in realty given to her for her separate use on a contingency—viz., the insolvency of her husband—until the event has happened upon which her estate arises. See also *Keays v. Lane*, 3 I. R. E. 1.

Although ordinarily the husband is liable to the funeral expenses of the wife, even if she have separate estate (*Bertie v. Lord Chesterfield*, 9 Mod. 31), she may by a charge in her will relieve her husband out of the separate estate, and, in effect, make a present to him of what her funeral expenses would have cost him: *Willeter v. Dobie*, 2 K. & J. 647, 649; see *Gregory v. Lockyer*, 6 Madd. 90; *Jenkins v. Tucker*, 1 H. Black. 90.

Separate estate undisposed of by married woman.—The undisposed of personal estate of a feme covert not required to meet her debts and engagements unless settled (*Re Rosenthal's Settlement*, 6 W. R. (V. C. W.) 139), will belong to her husband *jure mariti*, if in possession. See

Molony v. Kennedy, 10 Sim. 254, where L. Shadwell, V. C., held that cash and bank notes arising from property settled to the separate use of a married woman belonged to her husband in his marital right. See also, *Johnstone v. Lumb*, 15 Sim. 308; *Tugman v. Hopkins*, 4 Man. & Gr. 389; *Drury v. Scott*, 4 Y. & C. 264; *Bird v. Peagram*, 13 C. B. 639; and choses in action, as monies in the funds, settled to the separate use of a married woman, will belong to the husband on taking out administration: *Proudley v. Fielder*, 2 My. & K. 57; *Musters v. Wright*, 2 De. G. & Sm. 777.

The undisposed of real estate of a married woman settled to her separate use of which she is seised in fee descends to her heir, subject however to the right of her husband as tenant by the curtesy: *Roberts v. Dixwell*, 1 Atk. 607; and see *Pitt v. Jackson*, 2 Bro. C. C. 51; *Morgan v. Morgan*, 5 Madd. 408; *Follett v. Tyren*, 14 Sim. 125; *Harris v. Mott*, 14 *Beav. 169; *Appleton v. Rowley*, 8 L. R. Eq. 139, over-^[*512] ruling on this point, *Hearle v. Greenbank*, 3 Atk. 715. *Moore v. Webster*, 3 L. R. Eq. 267, seems to have been wrongly decided by Sir J. Stuart, V. C., against the husband's right to curtesy as the wife, was seised of the whole equitable fee. See the remarks of Sir R. Malins, V. C., in *Appleton v. Rowley*, 8 L. R. Eq. 143.

Savings and arrears of separate estate.—It may here be noticed that a married woman has the same power over the savings arising from her separate property as over property settled to her separate use (*Gore v. Knight*, 2 Vern. 535; *Gold v. Rutland*, 1 Eq. Ca. Ab. 346, pl. 18; *Fettiplace v. Gorges*, 1 Ves. Jun. 46; 3 Bro. C. C. 8; *Cecil v. Juxon*, 1 Atk. 278; *Muggeridge v. Stanton*, 1 De G. F. & J. 107). And the savings arising from her separate property will be liable for her contracts in the same manner as property settled to her separate use. Thus in *Butler v. Cumpston*, 7 L. R. Eq. 16, one of two trustees of a marriage settlement, under which the wife took a separate estate for life, without power of anticipation, having shares in a bank vested in him upon the trusts of the settlement, obtained an allotment of new shares at the request of the wife, and upon the faith of her representations that the purchase money should be paid out of certain savings of her separate estate. It was held by Sir R. Malins, V. C., that the savings of the wife's separate estate were liable to indemnify the trustee against all calls and liabilities incurred on her behalf in respect of the shares.

The savings arising from property in the hands of trustees, settled to the separate use of a married woman without power of anticipation, will not, it seems, be liable to the restraint against anticipation, if she simply transferred such savings to the trustees without showing any intention that such savings were to be held upon the same trusts as the funds from which they were derived: *Butler v. Cumpston*, 7 L. R. Eq. 16.

A wife will have the benefit of any outlay by her husband upon real estate, settled to her separate use: if for instance, he builds houses upon it with his own money, the houses so built will become the wife's, and her interest in them will be to her separate use: *Barrock v. M' Culloch*, 3 K. & J. 110, 124.

It has been held that where a husband living separate from his wife remits money to her for her support and maintenance, it will be considered as her separate estate, and the husband cannot in equity file a bill against his wife, to recover the savings: *Brooke v. Brooke*, 25 Beav. 342; but see *Messenger v. Clarke*, 5 Exch. 388.

*Arrears of separate estate in the hands of trustees, due at the time of a second marriage, will be considered as retaining [513] their original character (*Ashton v. M'Dougall*, 5 Beav. 56); but not, it seems, where the trustees have discharged themselves of the trust by paying them to the lady, or her order, or by her direction, during her widowhood, for then such arrears cease to be separate property; and, upon a second marriage, her husband will become entitled thereto: *Spicer v. Dawson*, 5 W. R. 431, M. R.

Aid afforded by Equity to protect and recover the separate property of a married woman.—Where property is settled to the separate use of a married woman, she will be protected in the enjoyment of it by Courts of equity; and her husband, or his creditors, will, if necessary, be restrained by injunction from interfering with it. Thus, in *Green v. Green*, 5 Hare, 400 (n.), a wife, upon a bill filed by her against her husband, obtained an injunction, restraining him from taking proceedings to recover or receive the rents and profits of the trust property (leaseholds), or otherwise intermeddling or interfering with the trust estates, furniture, and effects, and from continuing in possession of a certain house (in which the husband and wife had resided). Upon a motion by the husband to dissolve the injunction, it was argued on his behalf, that the injunction restraining him from continuing in possession of the house in which the wife resided, and from interfering with the furniture, operated as a divorce a mensa et thoro, Sir L. Shadwell, V. C., however, refused the motion, with costs, observing, that "if the injunction had the effect attributed to it,—a question which he could not determine,—the husband would not be without his remedy in the Ecclesiastical Court."

So, likewise, in *Newlands v. Paynter*, 4 My. & Cr. 408, a married woman being entitled under a will to leaseholds and furniture to her separate use without the intervention of a trustee, they were seized in execution by a judgment creditor of her husband, Lord Cottenham, however, restrained the sale of them by the sheriff, and there being a dispute as to whether the whole of the property passed by will, and as to whether part of the property had not been purchased by the wife out of the savings of her separate estate (in which case it would be

equally entitled to protection), his Lordship directed inquiries to ascertain the facts.

So where a married woman to whom a sum of money was payable for her separate use, received a cheque from the Accountant-General, and handed it over to her solicitor, who accompanied her; the solicitor was, on motion, ordered by Sir John Romilly, M. R., to pay the balance to his client; *and it was held that the onus being upon [*514] the solicitor to show cause for not paying it at once, he could not set up a voluntary agreement to pay a debt due to him from her husband out of it. "An arrangement," said his Honor, "of this sort would not be of the slightest avail. It is an agreement with a married woman who was entitled to receive a sum of money for her separate use, without any professional advice except her personal solicitor, and without any consideration whatever, to pay debts due from her husband, in respect of which she was under no species of liability; and it is clear to me, that the arrangement cannot afford a sufficient reason why her solicitor should not pay over a sum ordered to be paid to her separate use, and which he, accompanying her to the Accountant-General's office, received as her solicitor for that purpose. His duty, when he received the money, was to pay it to her, and not to carry it over in his own books to the account of her husband: *Mawhood v. Milbanke*, 15 Beav. 36.

But where a husband exercises his legal right by assigning to a purchaser for value without notice, his wife's separate property, she has no remedy against the purchaser. Thus in *Dawson v. Prince*, 2 De G. & Jo. 41, a bill of exchange payable to the order of C. D., a married woman, was remitted to her in respect of her separate estate. Her husband got possession of it without her knowledge, forged her name on the back, then indorsed his own name, and gave the bill to P. to get it discounted, stating that she had indorsed it. P. got it discounted, and in order so to do was obliged himself to indorse it. He then paid the proceeds to the husband. The acceptor, in consequence of a notice from C. D., refused to pay the holder, who thereupon had recourse to P. P. paid the holder. A suit having been instituted by C. D. to establish her title to the bill, and to restrain P. from suing the acceptor at law: it was held, by the Lords Justices of the Court of Appeal, reversing the decision of Sir John Romilly, M. R. (5 W. R. 813), that P. was to be treated as a purchaser of the bill for value, and also that assuming P. to have notice that the bill was drawn in respect of C.'s separate estate, yet as there was nothing to excite suspicion of the forgery, he was justified in relying on the husband's statement that the bill had been indorsed by her, and was not bound to inquire further as to the genuineness of her signature, and that there was therefore no equity to restrain him from the assertion of the legal right which he acquired by the husband's indorsement.

It seems that a married woman cannot sue alone in equity for an injunction to restrain a mere personal nuisance, although she alleges that the value of property *to which she is entitled to her separate use is thereby depreciated in value; for if the nuisance were [515] merely personal, then it is doubtful whether the wife alone, or by her next friend, could sue without the husband, and injury to her property is not of itself a nuisance: *White v. Cohen*, 1 Drew. 312.

When the wife assigns her separate property to secure the debt of her husband, she is entitled as between herself and her husband, and his assignee, under the Insolvent Debtors Act, to have his property comprised in the same security first applied in payment of the debt: *Aguilar v. Aguilar*, 5 Madd. 414.

A Court of law will, it seems, now recognise transactions between husband and wife relative to the separate estate of the latter, and in a recent case it was held by the Court of Queen's Bench, that a husband and wife could jointly maintain an action against a party who had received a sum of money at the request of the husband and wife, for the purpose of appropriating it to the separate use of the wife; *Jones v. Culbertson*, 7 L. R. Q. B. 218; and see *Fleet v. Perrins*, 3 L. R. Q. B. 536; 4 Q. R. L. B. 500.

And at common law it has been held, upon equitable pleas, that a husband, although having the legal estate, will not be able to maintain an action for trespass, wrongful conversion, or assault in respect of acts done with regard to land by the equitable lessee, of his wife, who was entitled to it for her separate use: *Allen v. Walker*, 5 L. R. Exch. 187.

What words will create a separate use.—No particular form of words is necessary in order to vest property in a married woman to her separate use; but the intention to give her such an interest in opposition to the legal rights of her husband, must be clear and unequivocal: *Stanton v. Hall*, 2 Russ. & My. 180. It has been held that the marital rights of the husband will be defeated if there is a gift or settlement of property to his wife or her trustees, for her "sole and separate use:" *Parker v. Brooke*, 9 Ves. 583; *Archer v. Rorke*, 7 I. Eq. Rep. 478: and see *Hulme v. Tenant*; or "for her own use and at her own disposal:" *Pritchard v. Ames*, 1 T. & R. 222; "for her own use, independent of her husband:" *Wagstaffe v. Smith*, 9 Ves. 520; "for her own use and benefit, independent of any other person:" *Margetts v. Barringer*, 7 Sim. 482; *Glover v. Hall*, 16 Sim. 568; "for her livelihood:" *Darley v. Darley*, 3 Atk. 399. And see *Cape v. Cape*, 2 Y. & C. Ex. Ca. 543; but see *Lee v. Prieaux*, 3 Bro. C. C. 383; *Wardle v. Claxton*, 9 Sim. 324; or, "that she should receive and enjoy the issue and profits;" *Tyrell v. Hope*, 2 Atk. 558. So *where, as in *Hulme v. Tenant*, [516] there is a direction that "the interests and profits be paid to her, and the principal to her, or to her order by note in writing under

her hand;" or, "her receipt to be a sufficient discharge:" *Lee v. Prieaux*, 3 Bro. C. C. 381; *Stanton v. Hall*, 2 Russ. & My. 180; or, "to be delivered to her on demand:" *Dixon v. Olmius*, 2 Cox, 414; or the husband "is to have no control:" *Edwards v. Jones*, 14 W. R. M. R. 815.

In the recent case, however, of *Gilbert v. Lewis*, 1 De G. Jo. & Sm. 38, it was held by Lord Westbury, C., affirming on another point the decision of Sir W. P. Wood, V. C. (2 J. & H. 452), that a devise to a widow "for her sole use and benefit" without the intervention of trustees did not give to her a separate estate.

It appears to have been formerly supposed that the words "sole use" had acquired a technical signification similar to the words "separate use," or "sole and separate use," and were of themselves sufficient to exclude the manifest right to confer upon a woman an estate to her separate use (*Cox v. Lyne*, You. Exch. Ca. 562; *Lyndsell v. Thacker*, 12 Sim. 178); and it may now be considered to be established by the case of *Gilbert v. Lewis*, 1 De G. Jo. & Sm. 38, followed by *Lewis v. Matthews*, 2 L. R. Eq. 177, and by the decision of the House of Lords in *Massy v. Bowen*, 4 L. R. Ho. Lo. 288, affirming the decision of the Court of Appeal in Ireland, reported 1 I. R. Eq. 110, nom. *Massy v. Hayes*, that the word "sole" in a will has not a fixed technical meaning like the word "separate," and will not of itself exclude the marital right. See also *Green v. Marsden*, 1 Drew. 646.

But, as is well observed in a recent decision in Ireland, the primary and grammatical meaning of the word "sole" does signify exclusion: and the real question to be solved is, exclusion of whom? When the woman is unmarried, and the instrument does not in terms, or from the circumstances, point this expression to a future coverture, the exclusion is now settled to be of others in general, and, therefore, not to apply with the required particularity to an after-taken husband. But if the woman is married, the exclusion most natural to occur to the mind of the donor, aware of her coverture, is that of the husband; and he can be excluded only by holding the property to be to the separate use of the wife. Per Barlow, V. C., in *Hartford v. Power*, 2 I. R. Eq. 212. Thus a settlement for the "sole use, benefit, and disposition of a lady about to marry (*Ex parte Ray*, 1 Madd. 199, 207; and see *Arthur v. [517]* *Arthur*, 11 Ir. Eq. Rep. 511); and a bequest in a *will by the words "solely and entirely for her own use and benefit for life," to a married woman (*Inglefield v. Coghlan*, 2 Coll. Ch. C. 247; and see *Green v. Britten*, 1 De G. Jo. & S. 649), gave to them separate estates.

And a bequest to an unmarried woman "for her own sole use and benefit" absolutely, has been held to give her a separate estate, because the testator, in another clause in his will, showed he contemplated there a future marriage of the lady, though in the bequest itself there

was no reference of any kind to that event. See also *Ex parte Killick*, 3 M. D. & De G. 480.

And the interposition of trustees may give to such words as "sole benefit" the same technical meaning as the words "separate:" *Adamson v. Armitage*, 19 Ves. 416; *Gilbert v. Lewis*, 1 De G. Jo. & S. 38.

And words apparently confining the operation of the separate use clause to members of a class married at the death of the testator, may, by the context, be extended so as to include those married subsequently. Thus, where a testatrix directed "that the legacies and shares of such of my nieces as *are* married shall be to their separate use, free from the debts and control of *any* husband; and, that my trustees *shall have* power to give effect to this my intent," it was held by Sir L. Shadwell, V. C., that the testatrix had used the words in a future sense, and that she intended those of her nieces who married after her death, as well as those who were married at that time, should take to their separate use: *In re Bayliss's Trusts*, 17 Sim. 178.

Where a testator, after giving his residuary property to two nieces, added, "I confine my said legacies hereinbefore mentioned, to be given to my nieces and their children, *without comprehending their husbands*, unless they, my said nieces or either of them, should die without issue;" Sir John Romilly, M. R., was of opinion that the only way to give effect to these words was to give the residue between the nieces equally for their *separate* use for life, and after their deaths to their children, and if they had no children, then it would belong to the nieces absolutely: *Dawson v. Bourne*, 16 Beav. 29.

Where a testatrix devised a freehold estate to trustees for the use and benefit of her daughter, who was to receive the rents and profits from the tenants herself, while she lived, whether married or single, and she also directed that no sale or mortgage should be made of the estate or the rents arising from it during the life of her daughter, it was held by the Lords Justices of the Court of Appeal, reversing the decision of Sir John Romilly, M. R., that the devise amounted to a gift to the separate use of the daughter without *power of anticipation: [*518] *Goulder v. Caimm*, 1 De G. F. & Jo. 146.

An indefinite bequest of the *interest* of a fund to a woman to her separate use, will give to her the *capital* also to her separate use. Thus, where a testator gave the interest of a capital sum of 1000*l.* to his wife for her sole use and benefit, and free from the debts and control of any husband she might marry, and directed that her receipt alone should be a sufficient discharge to his executor, it was held by Lord Cranworth, V. C., that the gift of the interest of 1000*l.* passed the capital to the widow, and that she was entitled to it to her separate use: *Humphrey v. Humphrey*, 1 Sim. N. S. 536.

So a bequest of a sum of money to a married woman for her own use, *nevertheless* during her life, the executors were to invest the sum and

to pay the dividends during her life to her separate use, independent of any husband, was held to give her an absolute and not merely a life interest: *Gurney v. Goggs*, 25 Beav. 334.

In a recent case a testator gave all his real and personal estate to trustees in trust for his wife for life, and after her decease for his daughter absolutely; and he directed that the principal moneys, rents, issues, profits, interest dividends, and proceeds which his wife and daughter, or either of them, should be entitled to under his will, should be paid into their own proper hands as the same became due, and not by way of anticipation; and should be for the separate use and benefit of his wife and daughter; and for which moneys, rents, issues, profits, interest dividends, or proceeds, the receipt alone of his wife and daughter, whether covert or sole, should be an effectual discharge to his trustees. It was held by Sir R. Kindersley, V. C., that the corpus of the real estate was not given to the separate use of the testator's daughter: *Troutbeck v. Boughey*, 2 L. R. Eq. 534.

As to the exclusion of the marital right by a French settlement, see *Este v. Smyth*, 18 Beav. 112.

But it has been held that no separate use has been created where there is a mere direction "to pay to a married woman and her assigns:" *Dakins v. Berisford*, 1 Ch. Ca. 194; *Lumb v. Milnes*, 5 Ves. 517; or there is a gift "to her use:" *Jacobs v. Amyatt*, 1 Madd. 376, n.; "to her own use and benefit:" *Johnes v. Lockhart*, cited 3 Bro. C. C. 383, n.; *Wills v. Sayers*, 4 Madd. 409; *Roberts v. Spicer*, 5 Madd. 491; *Kensington v. Dollond*, 2 My. & K. 184; *Beales v. Spencer*, 2 Y. & C. C. 651; to her "absolute use:" *Ex parte Abbott*, 1 Deac. 338; unless the context requires the words "absolute use" to be construed as "separate use:" *Shewell v. Dwarries*, Johns. 172; or when a payment is directed to be made "into her proper hands, to and for her own use and benefit:" *Tyler v. *Lake*, 4 Sim. 144; *S. C.*, 2 Russ. [*519] & My. 183; into her proper hands, "to her own proper use and benefit:" *Blacklow v. Laws*, 2 Hare, 49; but see *Hartley v. Hurle*, 5 Ves. 545; or when property is "to be under her sole control:" *Massey v. Parker*, 2 My. & K. 174; or where there is a devise without the intervention of trustees, "for her sole use and benefit:" *Gilbert v. Lewis*, 1 De G. Jo. & Sm. 38; *Lewis v. Matthews*, 2 L. R. Eq. 177; *Massey v. Bowen*, 4 L. R. Ho. Lo. 288; *S. C.*, 1 I. R. Eq. 110, nom. *Massey v. Hayes*; or a direction to transfer "to own use and benefit:" *Darcy v. Croft*, 9 Ir. Ch. Rep. 19, 31. So, a bequest to a woman and her assigns for her life, "for her and their own absolute use and benefit," does not confer upon her a separate estate: *Rycroft v. Christie*, 3 Beav. 238.

So, a bequest by will to the testator's wife for life of the income of property, "to be expended by her as she might think fit and proper and agreeable to her free will and pleasure," has been held not to give

her a separate use in the same: *Re Graham's Trusts*, 20 W. R. (V. C. M.) 289.

And where a testator gave 1000*l.* to his sister for her, or for her children's sole use and benefit forever, and directed his executors to pay the same to her as soon as possible, it was held that the sister did not take the 1000*l.* to her separate use: *Chipchase v. Simpson*, 16 Sim. 485.

As to whether presents made by a husband to his wife before and after marriage will be her separate property, see *Grant v. Grant*, 34 Beav. 623, W. R. (M. R.) 1057.

Where a husband and wife agree to live separate, and not to interfere with any property which each may subsequently acquire, the wife's subsequently acquired property will be considered as her separate estate: *Haddon v. Fladgate*, 1 Sw. & Tr. 48.

Where a decree erroneously states that a married woman is entitled to her separate use, the Court not having decided what her interest was, it is not binding as a declaration of right, and must be disregarded: *Moore v. Waller*, 11 W. R. (V. C. K.) 713.

As to restraint upon alienation.—When once it was established that the separate property of a married woman must be so far enjoyed by her as a feme sole, as to bring with it all the incidents of property, and that she might therefore dispose of it as a feme sole, it was found that, to secure her the desired protection against the influence and control of her husband, which, if exercised, would in all probability be destructive of her estate, it was necessary to insert in settlements and wills a clause restraining the wife from anticipating or alienating her separate property. This clause was first inserted in Miss Watson's *settle- [*520] ment, by the advice of Lord Thurlow, who was a trustee (*Pybus v. Smith*, 3 Bro. C. C. 347; *Parkes v. White*, 11 Ves. 221; *Jackson v. Hobhouse*, 2 Mer. 487; and see the remarks of Lord Cottenham in *Rennie v. Ritchie*, 12 C. & F. 234); and it is valid, when annexed to a gift to a married woman for her separate use, whether the subject of the gift be real or personal estate, or whether it be in fee or for life only: *Baggett v. Meux*, 1 Coll. 138; 1 Ph. 627; *Re Sykes' Trusts*, 2 J. & H. 415.

Although interest for many purposes is treated as accruing due die in diem, a married woman upon whom the fund out of which it proceeds is settled to her separate use without power of anticipation, cannot effectually assign an apportioned part of the interest up to the date of the assignment, but can only deal with the interest after it has become payable: *In re Brettle*, 2 De G. Jo. & Sm. 79; *Jollands v. Burdett*, 10 Jur. N. S. 349.

Although ordinarily the income of property, settled to the separate use of a married woman, is liable to make good a loss occasioned by her own breach of trust in making away with other property under the trust, if there be a clause against anticipation, future income during

coverture will not be so liable: *Clive v. Carew*, 1 J. & H. 199; *Pemberton v. M'Gill*, 1 Drew. & Sm. 266, ante, p. 493.

The clause against anticipation, when annexed to a gift to an Englishwoman whose husband is domiciled abroad, is valid and it cannot be dispensed with, even although by the law of the country where the husband is domiciled it is inoperative, because a change of domicile does not prevent an English citizen from taking property according to the form allowed by the law of England: *Peillon v. Brooking*, 25 Beav. 218.

Although there is a clause restraining alienation, the income is liable to costs properly incurred by the trustees, at any rate when they have authority under the instrument whereby they are appointed to reimburse themselves: see *D'Oechsner v. Scott*, 24 Beav. 239; there property was settled to the separate and inalienable use of a married woman for life, and the trustees were authorised, out of the moneys which should come to their hands, to reimburse to themselves all expenses to be incurred in or about the execution of the trusts or any matter relating to the settlement. A bill filed by her next friend, complaining of a breach of trust and to remove the trustees, was dismissed with costs, but by consent new trustees were to be appointed, and a receiver to get in the income. Before new trustees had been appointed and the costs paid by the next friend, he became insolvent. It was held [*521] *by Sir John Romilly, M. R., that the income in the hands of the receiver was applicable to the payment of the trustees' costs.

And the costs of a married woman, incurred by her in the defence to a suit by her husband, to set aside a post-nuptial settlement, whereby funds were assigned to trustees to secure an annuity to her separate use, without power of anticipation, were under the provisions of sect. 28 of 23 & 24 Vict. c. 127, charged on the annuity: *In re Keane*, 12 L. R. Eq. 115.

By a marriage settlement the income of a trust fund was to be paid during the joint lives of husband and wife, as they should appoint, "*but not so as to deprive themselves of the benefit thereof by charge or otherwise in the way of anticipation.*" Before a divorce *à mensâ et thoro*, they appointed the income between themselves in equal moieties. It was held by Sir John Romilly, M. R., that the appointment was valid, as they would not deprive themselves of the benefit of the fund by dividing the income between them: *In re Linzee's Settlement*, 23 Beav. 241.

As the separate use, and the restraint upon alienation, which is a modification of it, are creatures of equity called into existence merely for the purpose of securing to the wife the enjoyment of her own property free from marital rights and influence, they cease to exist when they are unnecessary for that purpose; thus, property given to the separate use of a woman, although subject to restraint upon anticipa-

tion, may be aliened by her at any time when she is discovert: *Tullett v. Armstrong*, 1 Beav. 1; 4 My. & Cr. 377.

It was, indeed, at one time, supposed, that the separate use, with the restraint upon anticipation, was only effectual during a coverture in existence at the time of the gift, and did not extend to a subsequent coverture: *Newton v. Reid*, 4 Sim. 141; *Brown v. Pocock*, 5 Sim. 663; *Woodmeeston v. Walker*, 2 Russ. & My. 207; but it is now clearly settled by the leading case of *Tullett v. Armstrong*, 1 Beav. 1, that although the separate estate, whether modified by restraint or not, is suspended while a woman is discovert, it is capable of arising upon the happening of any marriage. In that case, a testator gave property to trustees, in trust for his wife for life, with remainder to M. A. T., then a feme sole, for life, in such manner that it should not be anticipated, and that no husband should acquire any control over it. M. A. T. was unmarried at the death of the testator, but she married in the lifetime of the widow. It was held, by Lord Langdale, M. R., whose learned and elaborate judgment has settled the law upon a satisfactory basis, that both the *separate use clause, and the restriction against alienation, became effectual on her marriage; and his [*522] Lordship laid down the following rules as deduced from the authorities:—

“That property given to a woman for her separate use, independent of any husband, may, under the authority of this Court, be enjoyed by her during her coverture as her separate estate, although the property originally, or at any subsequent period or periods of time, became vested in her when discovert.

“That, in respect of such separate estates, she is, by the Court, considered as a feme sole, although covert. Her faculties as such, and the nature and extent of them, are to be collected from the terms in which the gift is made to her, and will be supported by this Court for her protection.

“The words ‘independent of a husband,’ whether expressed or implied in the term of the gift, mean no more than that this Court will not permit the marital power of the husband to be used, in contravention of the enjoyment of the property, according to the terms of the gift.

“If the gift be made for her sole and separate use, without more, she has, during the coverture, an alienable estate independent of her husband.

“If the gift be made to her sole and separate use, without power to alienate, she has, during coverture, the present enjoyment of an unalienable estate independent of her husband.

“In either of these cases she has, when discovert, a power of alienation; the restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture; whilst the

me to trace the proceeds of the stock into shares or bonds; but the mere circumstance of its being possible to trace the proceeds of the sale, cannot enable this Court, in a case like the present, where once the cestui que trust, being discoverd and sui juris, has converted the property from its original form, and has dealt with it as absolute owner, to treat the property into which the proceeds of the sale can be so

traced as still *subject to a trust for her separate use."

[*525] A trust for the separate use of a woman may be confined to a particular coverture (*Moore v. Morris*, 4 Drew. 33). Secus where the words show that the separate use is intended to last during the whole life of the wife. See *Gaffee's Settlement*, 1 Mac. & G. 541; *Hawkes v. Hubback*, 11 L. R. Eq. 5, overruling *Knight v. Knight*, 6 Sim. 121; *Benson v. Benson*, 6 Sim. 126; *Bradley v. Hughes*, 8 Sim. 149.

Restraint on alienation cannot be dispensed with by the Court.—Where there is attached to the separate use of a married woman a clause against anticipation, the Court has no power to release it from that restraint, even in cases where it would manifestly be for her benefit to do so. Thus where a testator gave a married woman a legacy upon condition that she conveyed within twelve months, her separate estate, which was subject to a restraint against anticipation to certain persons, it was held by Sir John Romilly, M. R., that effect could not be given to the bequest, though highly beneficial to the married woman. "It is said," observed his Honor, "that these cases of separate use and restraint are mere creatures of equity, and that therefore a Court of Equity may deal with them as it thinks right. It is, no doubt, true that they have arisen from the doctrines laid down by the judges who have presided in courts of equity; but so have all trusts, and it does not therefore follow that this Court can dispense with or mould this fetter as and when it thinks fit. I entirely concur in the argument, that if the Court could, on the present occasion, dispense with it, because it is for the interest of the married woman, it might and would in like manner be dispensed with, if a person offered to give her three times the value of the property to settle it on the same trusts, provided she conveyed her separate and unalienable interest in the property. But I am of opinion that she could not so convey it: the first testator has thought fit to impose certain fetters on his property, which are sanctioned by the law of England, and which it permits a testator to impose: those fetters remain and make the property in the hands of the devisee or legatee absolutely inalienable for any consideration whatever:" *Robinson v. Wheelwright*, 21 Beav. 214, affirmed on appeal, 6 De G. Mac. & G. 535. See also *Peillon v. Brooking*, 25 Beav. 218.

Where there is an absolute gift to a married woman but with a restraint upon anticipation, the fund cannot during the coverture be parted with by the Court: *Gaskell's Trusts*, 11 Jur. N. S. (V. C. W.), 780.

So where a married woman was *entitled to the income of property held in trust for her separate use, with a restraint upon anticipation, joined her husband in a power of attorney to receive and sue for any moneys due to them, it was held by Sir R. Malins, V. C., that the trustee was not justified in paying the attorney the wife's separate income: *Kenrick v. Wood*, 9 L. R. Eq. 333.

If an estate settled to the separate use of a married woman without power of anticipation, is subject to prior equities, such, for instance, as raising the costs of a suit, the Court may be able to direct a sale of the estate: *Fleming v. Armstrong*, 34 Beav. 109.

It seems that the clause restraining a married woman from anticipation does not exempt her from the ordinary consequences of lapse of time and acquiescence: *Derbishire v. Home*, 3 De G. Mac. & G. 80. See *Davies v. Hodgson*, 25 Beav. 186; and that she can bind herself by a compromise with her trustees as to the amount of the sum settled to her separate use: *Wilton v. Hill*, 25 L. J. (Ch.) 156.

What words will restrain alienation.—As in the case of the separate use, no particular form of words is necessary to restrain alienation, but the intention must be clear. Thus, where there was a direction to pay dividends to such persons and in such manner and form as the wife should, from time to time during her life, notwithstanding her coverture, by any note or writing under her hand appoint, and in default of appointment, into her proper hands for her separate use, and, after her death, to her husband: upon a bill being filed by the husband and wife, it was held there was no restraint upon alienation by the wife, and a transfer of the fund was, with the consent of the wife, made to the husband: *Clarke v. Pistor*, cited 3 Bro. C. C. 568; *Pybus v. Smith*, 1 Ves. jun. 189; *S. C.*, 3 Bro. C. C. 340; *Witts v. Dawkins*, 12 Ves. 501; *Brown v. Like*, 14 Ves. 302; *Sturgis v. Corp*, 13 Ves. 190. These decisions were followed in *Cooke v. Husbands*, 11 Md. 492, 503; but in *Perkins v. Hays*, 3 Gray, 405, the Court deduced restraint on alienation from words nearly equivalent to those employed in *Clarke v. Pistor*, and which differed from them chiefly in providing that the fund should be appropriated to the maintenance and education of the children. In the case of *Hovey v. Blakeman*, 9 Ves. 524, where there was a trust to pay rents, dividends, and profits, "into the respective proper hands of the testator's two sisters, so long as they should live, the same to be to their separate use," Sir William Grant, M. R., thought, as it was expressed, that an absolute property was not intended to be given to them, so as to give a power of disposition; that it was a personal bequest to them, to be paid into their respective proper hands, without a power of disposition; and he dismissed a petition of an annuitant under a grant from one of them, leaving her to file a bill, but intimating an opinion against it. The authority of *Hovey v. Blakeman*, is at least

[*527] *doubtful, if it is not to be considered as overruled; for, where expressions giving the wife a right to receive property "with her own hands," or, "with her own hands from time to time," or, where equivalent expressions are made use of, they are, to use the words of Lord Eldon, "only an unfolding of all that is implied in a gift to the separate use." See *Parkes v. White*, 11 Ves. 222; *Acton v. White*, 1 S. & S. 429; *Rose v. Sharrod*, 11 W. R. (V. C. K.) 356.

So where a testator, having bequeathed the sum of stock in trust for the separate use of his wife for her life, directed that it "*should remain during her life, and be, under the orders of the trustees, made a duly administered provision for her, and the interest of it to be given to her, on her personal appearance and receipt,*" by the banker the trustee might appoint; it was held by Lord Cranworth, V. C., that the wife was not prohibited from alienating her interest in the stock: *Ross's Trust*, 1 Sim. N. S. 196. See also *Wagstaff v. Smith*, 9 Ves. 520, 524. See and consider *Scott v. Davis*, 4 My. & Cr. 87, 89.

Although a bequest of stock for a married woman, for her separate use, for life, and after her decease, for her appointees, directs that, "in case any appointment should be made by deed, the same should not come into operation until after her death," the married woman is not thereby restrained from anticipation, nor prevented from appointing the fund by an irrevocable deed: *Alexander v. Young*, 6 Hare, 393.

In a recent case (*In re Young's Settlement*, 18 Beav. 199), a testator after bequeathing one-third of his residue to his daughter absolutely, to be vested at twenty-one, but not to be payable until twenty-five, declared that the beneficial interest thereby intended for his daughter should be for her separate use, independent of any husband she might marry, "but should devolve and be settled by deed in writing, upon her in such manner as if she were a *feme sole* and unmarried, and her interest in the said interest, dividends, and produce, should only be paid, as the same should respectively become and accrue due, and should not be anticipated by any deed or instrument whatsoever: and that in the meantime, and until his daughter should be married, she should only be entitled to receive and take her dividends, interest, and produce, and retain the power to give and bequeath the capital or principal fund by her last will and testament, and which power he thereby conferred upon her." *The daughter being unmarried*, it was held by Sir John Romilly, M. R., that she took absolutely, and was entitled to payment of the fund out of Court, on attaining twenty-one.

But where there was a declaration *that the receipt of the [*528] wife, or any person to whom she should appoint the income of property, *after the same should become due*, should be a valid discharge, it was held that she was restrained from alienation: *Field v. Evans*, 15 Sim. 375: but see the comments on this case in *Baker v. Bradley*, 2 Sm. & G. 531, 561; *Doolan v. Blake*, 3 Ir. Ch. Rep. 340. So, where

property is given to the separate use of a married woman "not to be sold or mortgaged," she will take, with a restraint upon alienation: *Steedman v. Poole*, 6 Hare, 193. Where, as in *Miss Watson's Case*, there is a gift or settlement of property to the separate use of a married woman, and it is expressed to be without power of anticipation, it is clear that alienation by her is restrained. See *Parkes v. White*, 11 Ves. 221; *Sockett v. Wray*, 4 Bro. C. C. 483; *Jackson v. Hobhouse*, 2 Mer. 487.

Where, according to a form at one time not unusual amongst conveyancers, the income of a fund was payable to such persons as a married woman should by writing, but not by way of anticipation, appoint, and in default of appointment there was a gift of it to her separate use, it was held by Sir L. Shadwell, V. C., that since the clause restraining anticipation was not expressly extended to the gift as well as to the power, she might execute a valid assignment of the income (*Brown v. Bamford*, 11 Sim. 127; 12 Sim. 616; and see *Barrymore v. Ellis*, 8 Sim. 1); and in another case his Honor held, that unless the clause restraining anticipation was expressly extended to the power, she might execute a valid appointment: *Medley v. Horton*, 14 Sim. 222. However, in *Brown v. Bamford*, 1 P. H. 620, Lord Lyndhurst, although at first he expressed an opinion in accordance with that of the Vice Chancellor, ultimately, upon a re-argument, overruled it; saying that the restriction against alienation extended to the whole gift: that such was the true construction of the bequest, and that it corresponded with, what appeared to have been the manifest intention of the testator. See also, *Harnett v. Macdougall*, 8 Beav. 187; *Moore v. Moore*, 1 Coll. 54; and in *Baggett v. Meux*, 1 Coll. 138, a testator devised real estate to his daughter, a married woman, in fee, but with a declaration that she should not sell, charge, mortgage, or encumber it, followed by another declaration, that she should take it for her own sole and separate use and benefit and disposal, and have the sole management thereof, independent of her husband, and free from his control or intermeddling. It was held by Sir J. L. K. Bruce, V. C., that the restraining clause was not void, inasmuch as it must be taken in connection, as well with the succeeding as the preceding words; and therefore, that a security, by way of equitable mortgage, executed by the husband and wife to a party who had notice of the wife's title under the will, was void as against the wife. This decision, which was affirmed, 1 Ph. 627, must be considered as overruling *Medley v. Horton*, 14 Sim. 222. See also *Gouldner v. Camm*, 1 De G. F. & Jo. 146.

It is not at all necessary that negative words should be introduced in the receipt clause, to complete the restraint upon alienation, for the clause must be construed to relate to the income, subject to such restraints as are imposed by the former part of the settlement. See *Harrop v. Howard*, 3 Hare, 624; *Brown v. Bamford*, 1 Ph. 626.

Where a person having power to appoint among a class or the children of a marriage, makes an appointment to the separate use of a married daughter, with a clause against anticipation, the Court, in order to prevent the execution of the power from being invalid as a breach of the rule against perpetuities, will reject the clause in restraint of anticipation: *Fry v. Capper*, Kay, 163; *In re Teague's Settlement*, 20 L. R. Eq. 564; and see *Leading Cases on Real Prop.*, p. 341, 2nd ed. And if a similar appointment be made to an unmarried daughter, who afterwards married, the marriage will not operate as an adoption of the trusts of the fund so as to establish the validity of the clause restraining anticipation: *In re Teague's Settlement*, 10 L. R. Eq. 564.

And where a bequest was made to persons in esse for life, with remainder to their unborn children, with a general direction that female children should take for their "separate and unalienable use," it was held by Lord Romilly, M. R., that such restriction was too remote and void: *Armitage v. Coates*, 35 Beav. 1. The language, however, of the direction may be such as by implication to confine the restriction to tenants for life: in which case it would be valid. *Ib.*

Where a woman of full age enters into an agreement on marriage for the settlement of her property to her separate use, it does not seem that the settlement itself should contain a clause against anticipation (*Symonds v. Wilkes*, 13 W. R. (L. J.) 1026, reversing the decision of Sir J. Romilly, M. R., 12 W. R. 541); at all events the Court cannot act as if such clause were inserted in the settlement, in the absence of a decree for the rectification of the settlement by ordering its insertion. *Ib.*

Statutory extension of the Equitable Doctrine of Separate Use, by 20 & 21 Vict. c. 85.]—It may here be noticed, that under the Act to amend the law relating to divorce and matrimonial causes in England [*530] (20 & 21 Vict. c. 85), it is enacted that—"A wife deserted by her husband may at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or, if resident in the country to justices in petty sessions, or in either case to the court (for divorce and matrimonial causes) for an order to protect any money or property she may acquire by her own *lawful industry*, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate or justices, or court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a feme sole. Provided always, that every such order, if made by a police

magistrate or justices at petty sessions, shall within ten days after the making thereof, be entered with the registrar of the County Court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the Court, or to the magistrate or justices by whom such order was made, for the discharge thereof: provided also, that if the husband or any creditor of, or person claiming under the husband shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable at the suit of the wife (which she is hereby empowered to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid: if any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation. (Sect. 21.) An order of protection obtained by a married woman who has been deserted by her husband does not protect property acquired by immoral practices, as by her living in adultery, and keeping a brothel: *Mason v. Mitchell*, 3 H. & C. 528.

Moreover, "In every case of a *judicial separation* the wife shall from the date of the sentence, and whilst the separation shall continue, be considered as a *feme sole* with respect to *property* of every description which she may acquire, or which may come to or devolve upon her; and such property may *be disposed of by her in all respects [*531] as a *feme sole*, and on her decease, the same shall in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place, shall be held to her separate use, subject however to any agreement in writing made between herself and her husband while separate." (Sect. 25.)

"In every case of a *judicial separation*, the wife shall whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant; provided, that where upon any such *judicial separation* alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use." (Sect. 26.)

This act has been amended by 21 & 22 Vict. c. 108, which gives jurisdiction to the judge ordinary to grant protecting orders (sect. 6), and extends the provisions of both Acts to property of which the wife

obtaining such order has or shall become entitled as executrix, administratrix or trustee. (Sect. 7.) The protecting order, which must state the time at which the desertion commenced (sect. 9), is to be deemed valid until reversed (sect. 8), and persons or corporations making payments under orders afterwards reversed are to be protected and indemnified. (Sect. 10.)

Where a wife has obtained a protecting order, which, it seems, is drawn up in general terms (*Mullineux v. Mullineux*, 6 W. R. (J. O.) 356,) she may obtain payment to herself of money in Court (*In re Kingsley's Trust*, 26 Beav. 84; *In re Rainsdon's Trusts*, 4 Drew. 446), or in the hands of trustees (*Cooke Fuller*, 26 Beav. 99), although it is given to her separate use, without power of anticipation. (*Ib.*)

And when she is executrix and residuary legatee, or even, it seems, when executrix alone, she may, after obtaining a protecting order, transfer stock standing in the name of her testator in the books of the Bank of England, and receive dividends as if she was a feme sole: *Bathe v. The Bank of England*, 4 K. & J. 564.

On the discharge of the protecting order, the property of the married woman becomes subject to the rights of her husband (per Turner, L. J., in *Rudge v. Weedon*, 4 De G. & Jo. 223).

Hence, if a suit has been instituted with reference to such property, which, by reason of the *protecting order, has become the [*532] separate property of the wife without the husband being made a party, on the discharge of the protecting order the plaintiff should bring the husband before the Court by supplemental order, under 15 & 16 Vict. c. 86, s. 52 (*Rudge v. Weedon*, 4 De G. & Jo. 216), but semble that it would not be right to do so if the wife were party to the suit in the character of executrix: *Rudge v. Weedon*, 4 De G. & Jo. 223.

As to what constitutes desertion on the part of the husband, see *Ex parte Aldridge*, 1 Sw. & Tr. 88. See 28 Vict. c. 43, being an Act to provide for the security of property of married women separated from their husbands in Ireland.

Statutory extension of the Equitable Doctrine of separate Use, by the Married Woman's Property Act, 1870, 33 & 34 Vict. c. 93.—In giving this statute, it will be most convenient to notice.

First, those clauses by which certain property may be acquired by a married woman to her separate use. *Secondly*, those by which, subject to certain provisions, protecting the interests of the husband and his creditors, investments in Savings Banks, the public stocks and funds, incorporated and joint-stock companies; friendly, benefit, building, or loan societies; or the insurance of her own or her husband's life, may be made or affected for her separate use. *Thirdly*, the clauses giving remedies in equity and at law to the husband and wife; and, *Fourthly*, those relating to the respective liabilities of the husband and wife.

1. *Under 33 & 34 Vict. c. 93, what property may be acquired by a married woman to her separate use.*—The wages and earnings of any married woman acquired or gained by her after the passing of this Act (9th August, 1870), in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property. (Sect. 1.)

Where any woman married after the passing of this Act, shall during her marriage become entitled to *any personal property* as next of kin, or one of the next of kin of an intestate, or to any sum of money not exceeding 200*l.* under *any* deed or will, such property shall, subject and without prejudice *to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her re- [*533] cepts alone shall be a good discharge for the same. (Sect. 7.)

Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this Act, as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same. (Sect. 8.)

2. *How certain investments may be made and policies effected for the separate use of a married woman.*

Government annuities and deposits in Savings Banks.—Notwithstanding any provision to the contrary, in the Act of 10 Geo. 4, c. 24, enabling the Commissioners for the Reduction of the National Debt to grant life annuities and annuities for terms of years; or in the Acts relating to Savings Banks and Post Office Savings Banks, any deposit hereafter made, and any annuity granted by the said Commissioners under any of the said Acts, in the name of a married woman, or in the name of a woman who may marry after such deposit or grant, shall be deemed to be the separate property of such woman, and the same shall be accounted for and paid to her as if she were an unmarried woman: *Provided*, that if any such deposit is made by, or such annuity granted to, a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section 9 of this Act, order such deposit or annuity, or any part thereof, to be paid to the husband. (Sect. 2.)

Public Stocks and Funds.—Any married woman, or any woman about to be married, may apply to the Governor and Company of the Bank of England, or to the Governor and Company of the Bank of

Ireland, by a form to be provided by the governor of each of the said banks and company for that purpose, that any sum forming part of the public stocks and funds, *and not being less than twenty pounds*, to which the woman so applying is entitled, or which she is about to acquire, may be transferred to, or made to stand in, the books of the governor and company to whom such application is made in the name or intended name of the woman, as a *married* woman entitled to her separate use; and on such sum being entered in the books of the said governor and company accordingly, the same shall be deemed to be the separate property of such woman, and shall be transferred and the dividends [*534] paid as if she were an unmarried *woman: *Provided*, that if any such investment in the funds is made by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under sect. 9 of this Act, order such investment and the dividends thereof, or any part thereof, to be transferred and paid to the husband. (Sect. 3.)

Incorporated or Joint-Stock Company.—Any married woman or woman about to be married, may apply in writing to the directors or managers of any incorporated or joint-stock company that any *fully paid up* shares, or any debenture, or debenture stock, or any stock of such company, to the holding of which no liability is attached, and to which the woman so applying is entitled, may be registered in the books of the said Company in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such directors or managers to register such shares or stock accordingly, and the same upon being so registered shall be deemed to be the separate property of such woman, and shall be transferred and the dividends and profits paid as if she were an unmarried woman: *Provided*, that if any such investment as last-mentioned is made by a married woman, by means of moneys of her husband, without his consent, the Court may, upon an application under sect. 9 of this Act, order such investment, and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband. (Sect. 4.)

Industrial, Provident, Friendly, Benefit, Building, Loan Societies.—Any married woman, or woman about to be married, may apply in writing to the Committee of Management of any Industrial and Provident Society, or to the trustees of any Friendly Society, Benefit Building Society, or Loan Society, duly registered, certified or enrolled under the Acts relating to such Societies respectively, that any share, benefit, debenture, right, or claim whatsoever in, to or upon the funds of such society, to the holding of which share, benefit, or debenture no liability is attached, and to which the woman so applying is entitled, may be entered in the books of the Society in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such committee or trustees to cause the same

to be so entered, and thereupon such share, benefit, debenture, right or claim shall be deemed to be the separate property of such woman, and shall be transferable and payable, with all dividends and profits thereon, as if she were an unmarried woman: *Provided*, that *if [*535] any such share, benefit, debenture, right or claim, has been obtained by a married woman by means of moneys of her husband without his consent, the Court may, upon an application under section 9 of this Act, order the same, and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband. (Sect. 5.)

Fraud on creditors of the husband.—Nothing hereinbefore contained in reference to moneys deposited in, or annuities granted by Savings Banks, or moneys invested in the funds, or in shares or stock of any company, shall as against creditors of the husband, give validity to any deposit or investment of moneys of the husband made in fraud of such creditors, and any moneys so deposited or invested may be followed as if this Act had not passed. (Sect. 6.)

Policies of Assurance.—A married woman may effect a policy of assurance upon her own life, or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman.

A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or Ireland, according as the policy of insurance was effected in England or in Ireland, or in England by the judge of the County Court of the district, or in Ireland by the chairman of the Civil Bill Court of the division of the county in which the insurance office is situated, and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured, an amount equal to the premiums so paid. (Sect. 10.)

3. *Remedies of the husband and wife in equity and at law.*

Questions of ownership between husband and wife.—In any question between husband and wife as to property declared by *this Act to be the separate property of the wife, either party may apply [*536] by summons or motion in a summary way, either to the Court of Chancery in England or Ireland, according as such property is in England

or Ireland, or in England (irrespective of the value of the property) [to] the judge of the County Court of the district in which either party resides, and thereupon the judge may make such order, direct such inquiry, and award such costs as he shall think fit, provided that any order made by such judge shall be subject to appeal in the same manner as the order of the same judge made in a pending suit or on an equitable plaint would have been, and the judge may, if either party so require, hear the application in his private room. (Sect. 9.)

Action by a married woman.—A married woman may maintain an action in her own name for the recovery of any wages, earnings, money and property by this Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have, in her own name, the same remedies, both civil and criminal, against all persons whosoever, for the protection and security of such wages, earnings, money, and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels and property to be her property. (Sect. 11.)

4. *Respective liabilities of husband and wife.*—A husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts, as if she had continued unmarried. (Sect. 12.)

This last section extends to property settled to the separate use of a married woman, without power of anticipation. Where, therefore, after the passing of that Act, and on the same day on which a marriage took place, but subsequently thereto, judgment was entered up against the wife for a debt incurred previously to the marriage, and the judgment creditors subsequently obtained a charging-order on the wife's interest in a fund in Court, to the income of which the wife was entitled for her separate use, without power of anticipation, it *was held that [537] the charging-order constituted a valid incumbrance on the fund: *Sanger v. Sanger*, 11 L. R. Eq. 470.

Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in Petty Sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her, for the maintenance of her husband, as by sect. 33 of "The Poor Law Amendment Act, 1868," they may now make and enforce against a husband for the

maintenance of his wife, who becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a feme sole by such and the same actions and proceedings as money lent. (Sect. 13.)

A married woman, having separate property, shall be subject to all such liability for the maintenance of her children as a widow is now by law subject to for the maintenance of her children, provided always that nothing in this Act shall relieve her husband from any liability at present imposed upon him by law to maintain her children. (Sect. 14.)

Of Pin-money.—It was said in the leading case of *Howard v. Digby*, 8 Bligh, N. R. 259, that no definition of pin-money was to be found in the books upon which reliance could be placed; that the line which divided it from the separate property of the wife could not be traced with any distinctness, or in a way on which dependence could be placed.

Pin-money, however, may be described with sufficient accuracy to be an allowance settled upon the wife before marriage for the wife's expenditure on her person; it is to meet her personal expenses, and to deck her person suitably to her husband's dignity, that is to say, suitably to the rank and station of his wife. *Ib.* p. 268. Gifts or gratuitous payments may from time to time be made by the husband for the same purposes, 2 Bright, H. & W. 288.

This being the object of pin-money, it is evidently different from money settled to the wife's separate use, where the marital right is totally excluded; nor is it like an absolute gift from the husband to the wife. It is necessary to bear this in mind when questions arise relating to arrears of pin-money.

Upon this subject it may be considered to be law, that where *the wife *permits* her pin-money to run in arrear, she cannot, on the death of her husband, claim arrears for more than one [*538] year prior to his death; for the very object of the allowance of pin-money being to enable the wife to deck her person suitably to her husband's rank without having recourse to him continually for small sums of money, excludes the supposition that she may accumulate her pin-money, while her husband pays her bills.

Where, however, a wife from time to time demanded the arrears of her pin-money from her husband, and he promised that she should have it at last, it was held by Lord Hardwicke, C., that she was entitled to all the arrears due at her husband's death: *Ridout v. Lewis*, 1 Atk. 269.

Where a husband has paid for all the wife's apparel, and provided for all her private expenses, she cannot, it seems, at any rate where there is no evidence that she ever demanded her pin-money, claim for

any arrears at the death of her husband: *Powell v. Hankey*, 2 P. Wms. 84; *Thomas v. Bennet*, 2 P. Wms. 341; *Fowler v. Fowler*, 3 P. Wms. 355. And even where the wife has been lunatic, if the husband has maintained her in a manner befitting her rank and station, providing all those things for her for which her pin-money was set apart, neither she nor *a fortiori* her personal representatives can claim any arrears of pin-money: *Howard v. Digby*, 8 Bligh, N. R. 224.

The personal representatives of the wife cannot go back for a year, or even any part of a year, for the arrears of pin-money, for the allowance of pin-money has relation only to the personal dress and expenses of the wife: *Howard v. Digby*, 8 Bligh, N. R. 245.

Paraphernalia.—The paraphernalia of the wife include such apparel and ornaments of the wife as are suitable to her condition in life, such as pearls, rings, watches and other jewellery given to the wife to be worn as ornaments of her person only: *Graham v. Londonderry*, 3 Atk. 394.

Old family jewels, however, of the husband, though worn by the wife, do not constitute part of her paraphernalia, unless she has acquired them by gift or bequest: *Jervoise v. Jervoise*, 17 Beav. 566.

The wife has no power to dispose of her paraphernalia during her husband's life (1 Bright, H. & W. 287).

The husband, however, may by act inter vivos during the life of his wife, dispose of her paraphernalia either by sale or gift: 1 P. Wms. 730; *Wilcox v. Gore*, 11 Vin. Ab. 180, Pl. 19; *Northey v. Northey*, 2 Atk. 78; *Seymore v. Tresilian*, 3 Atk. 358, 359, and see *Hastings v. Douglass*, Cro. Car. 344.

He cannot, however, dispose of them by will (*Ib.*), but if he does [*539] *so and confers other benefits upon the wife by his will; she will be put to her election between her paraphernalia and the benefits she may take under the will: *Churchhill v. Small*, 2 Kenyon, Rep. part 2, p. 6.

The paraphernalia of the wife, such as jewels purchased by the husband and given to her after the marriage, are liable to the debts of the husband: *Campion v. Cotton*, 17 Ves. 273, and see 2 Ves. 7; *Ridout v. The Earl of Plymouth*, 2 Atk. 104.

In the administration of assets, however, the widow's claim to her paraphernalia is preferred to general legacies: *Tipping v. Tipping*, 1 P. Wms. 730; *Snelson v. Corbet*, 3 Atk. 369. Hence she is entitled to have assets marshalled in all those cases in which a general legatee would have that right, viz., that as against the heir: *Tipping v. Tipping*, 1 P. Wms. 729, said by Lord Hardwicke to be "a leading case followed by the Court ever since:" 3 Atk. 395. See note to *Aldrich v. Cooper*, 2 Lead. Cas. Eq. post.

Where, however, a husband only pledges the wife's paraphernalia, and dies leaving a sufficient estate to redeem the pledge and pay all his

debts, she is entitled to have it redeemed out of his personal estate even to the prejudice of legatees; *Graham v. Londonderry*, 3 Atk. 393.

The widow may bar her right to paraphernalia by settlement (*Cholmely v. Cholmely*, 2 Vern. 83), and if her husband bequeaths to her her paraphernalia for life, and she dies without claiming them, as paraphernalia, she will, it seems, be presumed to have elected to take them under the will, and her executor or administrator will not be entitled to them: *Clarges v. Albemarle*, 2 Vern. 247.

It must be borne in mind that where articles such as ordinarily constitute paraphernalia are given to the wife, either before or after marriage, by a relative or friend, they will be considered as given to her separate use, in which case, as we have before seen, she may dispose of them as a feme sole, and they will not be liable to the debts or disposition of her husband. Thus, in the leading case of *Graham v. Londonderry*, 3 Atk. 393, the question in the cause between Mr Graham and Lord Londonderry was, whether Lady Londonderry, then the wife of the plaintiff, but originally the wife of the then late Lord Londonderry, was entitled in her own right, or as paraphernalia, to particular jewels thereafter mentioned.

First, as to diamonds given to her by Governor Pitt, her husband's father, and which were a present to her on the marriage with his son, Lord-Chancellor Hardwicke said, "This Court of latter years has considered such a present as a gift to the separate use *of the wife, [*540] and I am of opinion she is entitled in her own right."

The next question was as to four diamonds set about the picture of the late regent of France. Lord Londonderry returned from France, and delivered this picture to Lady Londonderry, and said at the same time it was a present sent to her by the regent of France.

With respect to this his Lordship said: If this be a present from the regent of France, it falls under the same rule, for being a present from a stranger during the coverture, it must be construed as a gift to her separate use, though I do not think it so clear a case as the others." See also *Lucas v. Lucas*, 1 Atk. 270; *Brinckman v. Brinckman*, 3 Atk. 394, cited. Sed vide *Jervoise v. Jervoise*, 17 Beav. 566.

Gifts also from the husband to the wife may be made to her separate use, where they are made to her absolutely and not merely to be worn as ornaments to her person only. See *Graham v. Londonderry*, 3 Atk. 393, where Lord Hardwicke says, "I have indeed admitted a husband may make such gifts, but where he expressly gives anything to a wife to be worn as ornaments of her person only, they are to be considered as mere paraphernalia, and it would be of bad consequence to consider them as otherwise; for if they were looked upon as a gift to her separate use, she might dispose of them absolutely, which would be contrary to his intention." See *Grant v. Grant*, 34 Beav. 623; 13 W. R. (M. R.) 1057.

No particular technical form of words is necessary to create a trust for the separate use of a married woman. It is enough that there be a clear and unequivocal intent to exclude the rights of the husband. If it be plain from the language of the instrument, or from all the circumstances disclosed in it, that the intention was to create a separate interest in the wife, this intention will be sustained and carried out; *Stuart v. Kissam*, 2 Barbour, 494, 496; *West v. West's Ex'rs*, 3 Randolph, 373; *Lewis v. Adams*, 6 Leigh, 320, 331, 335; *Perry v. Boileau*, 10 Sergeant & Rawle, 208; *Ballard and Wife v. Taylor et al.*, 4 Dessausure, 550; *Davis et ux. v. Cain's Ex'r*, 1 Iredell's Equity, 305, 307; *Heathman v. Hall*, 3 Id. 414, 420; *Hamilton v. Bishop & Fly*, 8 Yerger, 33, 40; *Beaufort, Adm'r, v. Collier*, 6 Humphreys, 487, 490; *Somers v. Craig*, 9 Id. 467; *Nixon v. Rose*, 12 Grattan, 425, 428; *Fears v. Brooks*, 12 Georgia, 195; *Cuthbert v. Wolfe*, 19 Alabama, 373; *Jenkins v. M'Conico*, 26 Id. 213, 238; *Williams v. Avery*, 38 Id. 115; no particular or even express words, being necessary to effectuate the intention, if manifest; *Fears v. Brooks*; *Clark v. Maguire*, 16 Missouri, 362; *Boal v. Morqner*, 46 Id. 40; *Whitten v. Jenkins*, 34 Georgia, 297; *Taylor v. Stone*, 11 Smedes & Marshall, 655; *Clark v. Maguire*, 16 Missouri, 311. But the intention to settle the property to the separate use of the wife must be unequivocal and unambiguous; *Jenkins v. McConico*, 26 Alabama, 213, 238;

Carroll v. Lee, 3 Gill & J. 504; *Turton v. Turton*, 6 Maryland, 375; *Brandt v. Mickle*, 28 Id. 436, 449. The intent must be evident, not merely to vest an interest in the wife, but to vest the entire interest in her, to the exclusion of the husband; *Hutts v. Colwell*, 7 Casey, 288. To sustain the claim of the wife, it is not enough that such a construction is possible or probable, or that one view is as consistent with the instrument as the other: the husband cannot be excluded by implication or conjecture. The instrument must either manifest a design to exclude him, or must contain provisions inconsistent with the assertion of his marital rights in respect to the property: see *Rudisell v. Watson*, 2 Devereux, Equity, 430, 432; *Ashcroft v. Little*, 4 Iredell's Equity, 236, 238; *Hunt & Tucker v. Booth, Edwards & Hunt*, 1 Freeman, 215, 218; *Williams v. Claiborne et al.*, 7 Smedes & Marshall, 488, 495; *Carroll v. Lee*, 3 Gill & Johnson, 505, 508; *Rome v. Rives*, 15 Arkansas, 330; *Nightingale v. Hidden*, 7 Rhode Island, 115; *Evans and Wife v. Knorr*, 4 Rawle, 66, 73; *Evans v. Gillespie*, 1 Swan, 128; *Cook v. Kennerly & Smith*, 12 Alabama, 42, 46, and cases there cited; *Moss v. M'Call*, Id. 630, 635; *Pollard et al. v. Merrill & Eximor*, 15 Id. 170, 173; *Mitchell v. Gates*, 23 Id. 438; *Welch's Heirs v. Welch's Adm'r*, 14 Id. 76; *Hale et al. v. Stone*, Id. 803, where the subject is much discussed. A mere bequest to a *feme covert*, will not be to her separate use; *Fitch v. Eyer*, 2 Connecticut,

143, 146; *Shirley v. Shirley*, 9 Paige, 364; nor will the intervention of a trustee be of itself sufficient to create a separate use; property given by deed or will, to a trustee in trust for a married woman, vests in the husband; *Evans and Wife v. Knorr*; *Mayberry v. Neely et als.*, 5 Humphreys, 337, 339; *Hunt & Tucker v. Booth, Edwards & Hunt*, 1 Freeman, 215, 218; *Welch's Heirs v. Welch's Adm'r*, 14 Alabama, 77; *Pollard et al. v. Merrill & Eximor*, 15 Id. 170, 174; *White v. White*, 16 Grattan, 264; *Genshaler v. Hauman*, 2 Bush, 329; but a conveyance by a husband to a trustee for the use of the wife, will necessarily be for her separate use, otherwise the transaction would be futile; *Steel v. Steel*, 1 Iredell's Equity, 452, 455; and the same is true of a gift or grant by the husband directly to the wife for her use; *Whitten and others v. Whitten*, 3 Cushing, 194, 199; *Powell v. Powell*, 9 Humphreys, 477, 486; *Wells v. Treadwell*, 28 Mississippi, 717. This principle was overlooked in *Bowen v. Sibree*, 1 Bush, 112, but would seem to be indisputable.

[Such grants are, however, void in law; *Dibble v. Dibble*, 1 Day. 51, and will, it has been said, be upheld by chancery no further than is requisite to afford a just and adequate provision for the wife, due regard being had to the fortune of the husband; *Benedict v. Montgomery*, 7 W. & S. 238, 242; *Stickney v. Borman*, 2 Barr, 67; *Shepard v. Shepard*, 7 Johnson's Chancery, 57; *Wells v. Treadwell*. Subject to this limitation, a deed

or gift from a husband to his wife operates as a declaration of trust, which will be sustained in equity as between the parties, and cannot be set aside by creditors, unless the circumstances are such as to render it a fraud on them; *Dennis v. Williams*, 26 Conn. 226; *Riley v. Riley*, 15 Id. 154.]

The following expressions have been held not to create a separate use in a married woman: a devise and bequest of lands and chattels to the testator's married daughter, "all to be for her and her heirs' proper use;" *Rudisell v. Watson*, 2 Devereux, Equity, 430, 432; a conveyance of chattels to a married woman, "but the said gift to extend to no other person;" *Ashcroft v. Little*, 4 Iredell's Equity, 236, 238; a provision that the property shall not be subject to the husband's debts; *Gillespie v. Burleson*, 2 Alabama, 551; *Lewis v. Elrod*, 38 Id. 17; a devise of lands "in trust for the use, benefit and behoof of" the testator's daughter for life; *Torbert v. Twining et al.*, 1 Yeates, 432; a conveyance of slaves to a trustee, in trust to permit the *feme covert* "to have the use and benefit of the labor and services of the said slaves, and all the proceeds thereof during her life, and at her death" to her children; *Hale et al. v. Stone*, 14 Alabama, 803; see also *Evans and Wife v. Knorr*, 4 Rawle, 66, and *Clevenstine's Appeal*, 3 Harris, 495. On the other hand a bequest to a married woman "for her own use;" *Jamison v. Brady and Wife*, 6 Sergeant & Rawle, 466; *Turton v. Turton*, 6

Maryland, 375; or "for her own proper use;" *Snyder v. Snyder*, 10 Barr, 423; or "her own and sole use;" *Jarvis v. Prentice*, 19 Connecticut, 273, 282; and a devise to a *feme covert* "to be for her and her family's use, during her natural life;" *Heck v. Clippenger*, 5 Barr, 385; the interest of a sum to a married woman "to be paid to her in equal half yearly payments during her natural life," and afterwards to her children; *Tyson's Appeal*, 10 Id. 221; a conveyance of chattels, "for the entire use, benefit, profit and advantage of" the *feme covert*; *Heathman v. Hall*, 3 Iredell's Equity, 414, 421; for "her sole and only use" and benefit; *Goodrene v. Goodrene*, 8 Iredell's Equity, 313; *Cuthbert v. Wolfe*, 19 Alabama, 373; a bequest to a married woman "entirely for her and for her children;" *Thurlow v. Merrill*, 23 Alabama, 705; or for her "exclusive use;" *Williams v. Avery*, 3 Id. 145; a gift of chattels, "to the use and benefit of said E. and children, and to remain in possession of said E. for the use and support of said children forever;" *Hamilton v. Bishop & Fly*, 8 Yeager, 33, 40; a bequest to a married woman "to be at her own disposal in true faith to her and her heirs forever;" *Bridges v. Wood*, 4 Dana, 610; a deed of gift to a trustee, "in trust for the proper use and benefit of the said (*feme covert*) and her heirs forever;" *Warren v. Haley et al.*, 1 Smedes & Marshall's Chancery, 647, 651; a conveyance of slaves to a married woman, "to her and her heirs; to have and to hold the

same, to and for her use, benefit and right, and of the heirs aforesaid without let, hindrance or molestation, whatever;" *Newman v. James & Newman*, 12 Alabama, 29; or to her "and her heirs after her, free from the claim or claims of any person or manner of persons whatever, absolutely as their own property right, as fully as though they had purchased them;" *Brown v. Johnson*, 17 Id. 232; or "exclusively to her and the heirs of her body forever;" *Gould v. Hill*, 18 Alabama, 84; a declaration of trust that the party held the property "for the sole use and benefit of, and in trust for Mrs. S., and that he would account for and pay over to her individually, all moneys that might be received thereon;" *Stuart v. Kissam*, 2 Barbour, 494, 496; and a covenant in a deed of gift of slaves from a father to a married daughter, "to make a clear and undoubted right, free from the claim or claims of any person or persons whatsoever;" *Jenkins v. M'Conico*, 26 Alabama, 213; have been held to create a separate use. The principle of construction is one in which all the courts agree, but in the application, the cases can hardly be reconciled; *Rudisel v. Watson*, and *Warren v. Haley et al.*, are in direct conflict; and *Ashcroft v. Little* could scarcely stand with *Newman v. James and Newman*. See *Mackie v. Burroughs*, 14 Ohio, N. S. 519, 521.

The intervention of a trustee is not necessary to the validity of a trust to the separate use of a married woman. If real or personal

property be given to her separate use, her interest will be protected by converting the husband into a trustee; *Boykin and Wife v. Ciples and Wife*, 2 Hill's Chancery, 200, 203; *Baskins v. Giles*, Rice's Equity, 316, 324; *Clark v. Makenna*, Cheves' Equity, 163, 166; *Long's Adm'r v. White's Adm'rs and Heirs*, 5 J.J. Marshall, 226, 227; *Trenton Banking Co. v. Woodruff et al.*, 1 Green's Chancery, 118, 126; *Steel v. Steel*, 1 Iredell's Equity, 452, 455; *Freeman v. Freeman and Challis*, 9 Missouri, 772; *Hamilton v. Bishop*, 8 Yerger, 33, 41; *Jamison v. Brady and Wife*, 6 Sergeant and Rawle, 466; *Heck v. Clippenger*, 5 Barr, 385, 387; *Shirley v. Shirley*, 9 Paige, 364; *Fears v. Brooks*, 12 Georgia, 195.

The principle adopted by some of the courts of this country, in regard to the power of a *feme covert* over her separate estate, is in many respects, opposite to that which prevails in England. For, while the English cases hold that she is, in respect to her separate estate, to be regarded as a *feme sole*, with all the powers which belong to that character, and that her note or bond, or other obligation will bind her estate, the rule adopted in many of the American courts, is, that a married woman has no power in relation to her separate estate, but such as has been expressly given to her, and that her note or bond will not charge her separate estate, except where a provision for that purpose is contained in the instrument creating the separate estate. As the

point is one of some nicety, it will be necessary to review the decisions in the several States separately. The lead in departing from the English doctrine was taken by the Court of Appeals of South Carolina.

In *Ewing v. Smith*, 3 Dessausure, 417, (1811,) in that State, Chancellor Dessausure, upon a laborious review of the English cases, considered the principle to be, that a *feme covert* having a separate estate, is to be held a *feme sole* to the extent of such property, unless expressly restricted; and he decided that the wife's separate estate was liable in equity upon a bond given by the husband and wife; but this was reversed in the Court of Appeals, by a majority of the Chancellors, and the rule declared that a *feme covert* has no power with regard to her separate estate, but what has been expressly given to her by the instrument of settlement, and that any powers so given must be strictly pursued. And this has ever since been the established principle in that State. A little doubt, indeed, was expressed in *Trustees of Frazier v. Center & Hall*, 1 M'Cord's Chancery, 270, 275, (1826,) but in *Magwood and Patterson v. Johnston and others*, 1 Hill's Chancery, 228, 230, (1833,) and in *Robinson v. Ex'rs of Dart*, Dudley's Equity, 128, 131, (1838,) it was declared by Harper, Ch., that since the decision in *Ewing v. Smith*, which had ever since been followed, there could be no doubt in that State, that a *feme covert* has no power to dispose of, or in any manner

charge, her separate estate, even with the consent of her husband and trustee; and in *Clark v. McKenna*, Cheves' Equity, 163, (1840,) this was admitted to be the rule, where the instrument does not expressly make her estate subject to her debts. And the same point has again been authoritatively and finally settled in the Court of Appeals, in *Reid v. Lamar*, 1 Strobhart's Equity, 27, 37, (1845,) where it was decided that an estate settled to the separate use of a feme covert, to be at her "full and free disposal," was yet not chargeable upon a note given by her and her husband. Johnson, Ch., indeed, has decided that it was chargeable; but this was reversed by the concurrence of the three other Chancellors in the Court of Appeals, and the rule of *Ewing v. Smith*, re-affirmed with increased confidence. "If anything can be considered as settled," said Harper, Ch., in delivering the opinion in the Court of Appeals, "it is the settled law of this State, that where property is given or settled to the separate use of a married woman, she has no power to charge, incur, or dispose of it, unless in so far as power to do so has been conferred on her by the instrument creating her estate; which power must be strictly pursued:—in contradiction to many English cases in which it has been held that she is a *feme sole*, with respect to her separate property, and may charge and dispose of it as she pleases, unless in so far as she is expressly restricted by the instrument. This has been the

settled law since the decision in *Ewing v. Smith*, followed by a great number of cases decided in conformity to it, for a period of more than thirty years, and without any decision impugning or conflicting with it—though some *dicta* of judges were found, seeming to imply that they thought the subject might still be open to consideration. . . . With respect to the decision in question, (in *Ewing v. Smith*,) even those who dissent from it on the score of authority, acknowledge the wholesomeness of its operation, and its tendency to promote the objects which the Court of Equity had in view, in recognizing a separate property in *femes covert*, and in protecting them against the influence or practices of their husbands; which might be exercised without the possibility of detection; and also to guard them against their own generous or devoted impulses. The judges who dissented from the opinion of the majority in *Ewing v. Smith*, afterwards acceded to it, and I am yet to learn that any inconvenience has followed to married women or their children—the objects of the court's protection. . . . Though it has sometimes been said in relation to our doctrine, that a married woman is only a *feme sole sub modo*, or to the extent that the settlement makes her so; yet these expressions are inaccurate. She can, in no manner of respect, be considered a *feme sole*. A *feme sole* disposes of, or charges, her property by her own act, and according to her own will, by her inherent power as owner.

A *feme covert* exercises a *delegated* authority, and cannot exceed it. She is enabled to execute a power, as, in some instances, any third person—*feme covert* or other—even those having no interest in the property, might be enabled to execute it, and bind her by their act." See, also, *Rochell v. Tompkins*, 1b. 114, 121. While, however, the principle is thus firmly settled in South Carolina, that the power of a married woman over her separate estate is derived from the instrument creating the estate, and that she has no other capacity to contract but as authorized or empowered by the settlement; it has been held, that if the deed of settlement expressly declare that the estate shall be liable for her own debts and contracts, it will be chargeable in equity for debts contracted by her expressly on her separate account; *Clark v. Makenna*, Cheeves' Equity, 163. But this is supposed to illustrate and enforce the general principle, and not to disturb it. "The case of *Clark v. Makenna*," said Harper, Ch., in *Reid v. Lamar*, "rested on no authority of the wife to bind her property as a *feme sole*, but upon the terms of the instrument, by which the property was made liable to her 'debts and contracts.' This resulted from the power of the *grantor* over the property." It is held, however, in South Carolina, to be a general rule in regard to trust estates, and applicable to a wife's separate trust, that a trust estate is liable in equity for debts incurred for its use and on its account, that is, for purposes for

which it was intended that the trust estate should be appropriated; see *Cajer v. Eveleigh*, 4 Dessaussure, 19; *James v. Mayrant*, Id. 591; *Montgomery v. Eveleigh and others*, 1 M'Cord's Chancery, 267, 269. But this liability is very strictly limited. It rests, solely, upon the equity that he who has advanced money, or given credit, to effect the objects of the trust, and has, therefore, accomplished, at his own expense, what the *cestui que trust* might and ought to have done out of the profits of the trust estate, has a right to be substituted in the place of the *cestui que trust*, or to be re-imbursed out of the trust estate. Money will not be considered as expended for the benefit of a trust estate, within the scope of this equity, except where it has added value to the estate, or defrayed charges to which the trust estate would be liable. And the court will inquire into the necessity and propriety of the charge, and will not allow the wife to charge her estate by her own mere act or will, but will require evidence that the necessity existed, and that credit was given specifically to the wife and her estate; *Magwood and Patterson v. Johnston and others*, 1 Hill's Chancery, 228, 232, 234, 236; see, also, *Clark v. Makenna*, Cheeves' Equity, 163; *Reid v. Lamar*, 1 Strobhart's Equity, 27, 40; *Rochell v. Tompkins*, Id. 114, 121; *Adams v. Mackey*, 6 Richardson's Eq. 75.

A similar view prevails in Ohio, where a married woman may charge the rents, issues and profits of her separate estate with the

costs of repairs and improvements which are for the benefit of the estate, although it seems that she has no general power of charge or alienation; *Mackie v. Buroughs*, 14 Ohio, N. S. 519.

In New York, the subject has undergone very able and profound discussion: and as, in South Carolina, the decision of the Chancellor, in the first of the cases, supporting the English rule, was reversed by the Court of Appeals, and that rule abolished; so, in New York, the decision of the Chancellor, condemning and altering the English rule, was reversed in the Court of Errors, and that rule set up as the principle to be adopted. In the case of the *Methodist Episcopal Church v. Jacques*, 3 Johnson's Chancery, 78, (1817,) the English authorities were reviewed by Chancellor Kent, with an acute and searching criticism, and were shown to be too uncertain and unsatisfactory to be relied upon as affording a sure guidance. "I apprehend," he observes, "we may conclude that the English decisions are so floating and contradictory, as to leave us the liberty of adopting the true principle of these settlements. Instead of holding that the wife is a *feme sole*, to all intents and purposes, as to her separate property, she ought only to be deemed a *feme sole*, *sub modo*, or to the extent of the power clearly given by the settlement. Instead of maintaining that she has an absolute power of disposition, unless specially restrained by the instrument, the converse of the proposition would

be more correct, that she has no power but what is specially given, and to be exercised only in the mode prescribed, if any such there be. Her incapacity is general; and the exception is to be taken strictly, and to be shown in every case, because it is against the general policy and immemorial doctrine of law. These very settlements are intended to protect her weakness against her husband's power, and her maintenance against his dissipation. It is a protection which this court allows her to assume, or her friends to give, and it ought not to be rendered illusory. The doctrine runs through all the cases, that the intention of the settlement is to govern, and that it must be collected from the terms of the instrument. When it says she may appoint by will, it does not mean that she may likewise appoint by deed; when it permits her to appoint by deed, it cannot mean, that giving a bond, or a note, or a parol promise, without reference to the property, or making a parol gift, is such an appointment. So, when it says that she is to receive from her trustee the income of her property, as it, from time to time, may grow due, it does not mean that she may, by anticipation, dispose at once of all that income. Such a latitude of construction is not only unauthorized by the terms, but it defeats the policy of the settlement by withdrawing from the wife the protection it intended to give her. Perhaps, we may say, that if the instrument be silent as to the mode of exercising the power of appoint-

ment or disposition, it is intended to leave it at large, to the discretion or necessities of the wife, and this is the most that can be inferred." On appeal to the Court of Errors, these fine observations were discredited by the common law judges, and the decree of the chancellor, and the opinion upon which it was founded, were pronounced to be erroneous. Spencer, Ch. J., declared that the decisions fully established, "that a *feme covert*, with respect to her separate estate, is to be regarded in a court of equity as a *feme sole*, and may dispose of her property without the consent or concurrence of her trustee, unless she is specially restrained by the instrument under which she acquires her separate estate;" and, "that the established rule in equity is, that when a *feme covert*, having separate property, enters into an agreement, and sufficiently indicates her intention to affect by it her separate estate, a court of equity will apply it to the satisfaction of such an engagement." And Platt, J., considered the rule to be, "That a *feme covert* having a separate estate is to be regarded as a *feme sole*, as to her right of contracting for and disposing of it. The *jus disponendi* is incident to her separate property, and follows of course, by implication. She may give it to whom she pleases, or charge it with the debts of her husband, provided no undue influence be exerted over her; and her disposition of it will be sanctioned and enforced by a court of equity, without the assent of her trustee,

unless that assent be expressly made necessary by the instrument creating the trust. And the specification of any *particular mode* of exercising her disposing power, does not deprive her of any *other mode* of using that right, not expressly, or by necessary construction *negatived* in the devise or deed of settlement:" *Jacques v. The Methodist Episcopal Ch.*, 17 Johnson, 548, 578, 579, 585. The principle thus established by the Court of Errors, was again recognized by the same tribunal in *Dyett v. N. A. Coal Co.*, 20 Wendell, 570, 573, where Mr. Justice Cowen, referring to their earlier decision, says, "Where the wife's separate estate is completely distinct, and, as here, independent of her husband, she seems to be regarded in equity, as respects her power to dispose of or charge it with debts, to all intents and purposes as a *feme sole*, except in so far as she may be expressly limited in her powers by the instrument under which she takes her interest." Her power of disposition, by way of alienation, in such cases, has subsequently been spoken of, in New York, as general; *Powell v. Murray*, 2 Edwards, 636, 643; and said to extend to a disposition either by deed or will; 10 Barbour, 597; *Wadham v. The Society*, 2 Kernan, 415; *The Albany Insurance Company v. Bay*, 4 Comstock, 9; see, also, *Cruger v. Cruger*, 5 Barbour's S. Ct. 227, 268: but in regard to the power of charging the estate for debts, the decisions in the chancery courts, in that state, have still held back from

the broad rule adopted in England, and tended strongly to the principle established in the South Carolina decisions, which have been referred to, and obviously approved. The rule laid down in the court of chancery has been, that the wife's separate estate is liable in equity for any debts contracted, by herself or her agent, for the benefit of that estate, or for her own benefit upon the credit of her separate estate; *North American Coal Co. v. Dyett*, 7 Paige, 9, 14; S. C., affirmed on error, 20 Wendell, 570; *Gardner v. Gardner*, 7 Paige, 112, 116; *Cumming & Pollock v. Williamson and others*, 1 Sandford, 17, 25; *Dickerman v. Abrahams*, 21 Barbour, 551; *Coon v. Brook*, *Ib.* 546; her disposing power being in the nature of a power of appointment, and some manifestation being necessary of her intention to appoint: *The Albany Fire Insurance Co. v. Bay*, 4 Comstock, 9. And it has been expressly determined, that where creditors do not claim under any charge or appointment made in pursuance of the instrument of settlement, they must show, that the debt was contracted, either *for the benefit of her separate estate*, or for her own benefit *upon the credit of the separate estate*; and that a *general debt* made by a married woman, having a separate estate, is not a charge upon that estate; and such estate is not chargeable upon any *implied* undertaking of hers; *Curtis v. Engel*, 2 Sand. 287, 289. And in that case, it was decided, that debts incurred for goods fur-

nished to the business concern which had belonged to the wife, were not chargeable upon the trust estate, because it was not satisfactorily proved, that the goods were sold upon the credit of her property, or that those who furnished them relied upon it, as *being her separate property*. See *Knowles v. M'Camly*, 10 Paige, 343, 346. In *Vanderheyden v. Mallory*, 3 Barbour, Ch. 10; 1 Comstock, 453, 462, it was said, that a *feme covert's* general personal engagement will not affect her separate property; but that, unless specially restrained by the instrument creating the separate interest, she may sell, pledge, or encumber that separate property, by any act or contract that shows an *intention* to affect it; and that any debt contracted by a married woman, for herself or her husband, is ordinarily taken to be *prima facie* evidence to charge the separate estate. To charge the separate property of a married woman under the rule as established in New York, the consideration must enure to her benefit, or the intention to create the charge must appear on the face of the contract; *Yale v. Dederer*, 18 New York, 576; 22 *Id.* 461; *Ledelling v. Powers*, 39 Barb. 555; and hence the courts of that State will not enforce a note given by a wife for the debt of her husband, although it is shown orally that she designed to charge her separate estate; *Yale v. Dederer*.

Recently, however, the revised statutes in relation to uses and trusts, have received a construc-

tion which limits the power of a married woman, in respect to separate trusts of real estate, more strictly than any one had before contended for. Under those provisions, it has been held, that not only cannot a *feme covert* dispose of, or charge her separate estate by anticipation in any manner, but that, as she cannot incur a personal debt, even the surplus income cannot be made liable for any obligation contracted by her after marriage, even for necessary repairs to the trust estate, without the authority of the trustee, and the trustee cannot charge the estate, except so far as he is authorized to do so by the terms of the trust: *L'Amoureux v. Van Rensselaer*, 1 Barbour's Chancery, 34, 37; *Rogers v. Ludlow*, 3 Sandford, 104, 108, 109; see *Wadham v. The Society*, 2 Kernan, 415.

[The power of a *feme covert* to charge or dispose of her separate property, is also recognized in Connecticut, Maryland, Alabama, Kentucky, North Carolina, Georgia, Missouri and Florida; *Lewis v. Yale*, 4 Florida, 418; *Nixon v. Bore*, 12 Grattan, 425; *Ozley v. Ikelheimer*, 26 Alabama, 332; *Jenkins v. M'Conico*, Ib. 213; *Ozley v. Ikelheimer*, Ib. 332, 336; *Bell v. Kellar*, 13 B. Monroe, 381; *Lillard v. Turner*, 16 Id. 374; *Burch v. Brackenridge*, Ib. 482; *Whitesides v. Cannan*, 23 Missouri, 457; *Segond v. Garland*, Ib. 547; *Coates v. Robinson*, 10 Id. 757; *Cooke v. Husbands*, 11 Maryland, 492; *Furnace v. Pool*, 1 Gill & Johnson, 217; *Imlay v. Huntington*, 20 Conn. 149; *Harris v. Har-*

ris, 7 Iredell's Equity, 311; *Wylly v. Collins*, 9 Georgia, 223; *Roberts v. West*, 15 Georgia, 123; although there is some difference of opinion, both as to the extent of the power itself, and the mode in which it must be exercised. In *Imlay v. Huntington*, a conveyance to the separate use of a married woman, was held to render the property conveyed as absolutely subject to her control as if she were sole, and to invest her with a general power of disposition, even when a specific power is conferred by the deed. A similar view has been taken in Alabama, and the control of a married woman over chattels which have been given to her separate use, said to result from the *jus disponendi*, which is one of the incidents of title or ownership, and not to partake of the nature of a power of appointment, or be subject to the rules by which the exercise of such powers is regulated. It may consequently be exercised by deed, or in pais, by way of gift, or sale, through a note, bond, or other instrument imposing a pecuniary obligation; in short, by any means which would operate directly or indirectly as a charge if she were sole; *Jenkins v. M'Conico*, 26 Alabama, 213; *Ozley v. Ikelheimer*; *Whitesides v. Cannan*. And the recent English cases were cited with approbation, which tend to show that when a debt is in other respects such as to be a charge on the separate property of a married woman, it will make no matter whether the engagement in which it originates, is verbal or written, *ante*, 692.

In *Fears v. Brooks*, 12 Georgia, 195, a *feme covert* was said to be viewed as a *feme sole* in equity, so far as her separate property is in question, and consequently to have an absolute power of disposition, unless restrained or fettered by the instrument in which her estate originates. The designation of a particular mode in the deed of gift or settlement, may preclude the adoption of any other; *Wylly v. Collins*, 9 Georgia, 223; *Weeks v. Sego*, Ib. 201; but where there is no express or implied restraint, her separate estate is liable for the payment of any debt evidenced by a bond, note, or other instrument under her hand or seal; *Dallas v. Heard*, 32 Georgia, 604. Nearly the same ground was taken in *Cooke v. Husbands*, 11 Maryland, 492, and the grant of property to the separate use of a *feme covert*, said, *prima facie*, to confer a power of alienation which might, however, be restrained either by an express prohibition, or impliedly by designating a particular mode in which the power should be exercised. In Kentucky, a *feme covert* may charge personal property, held for her separate use, by any oral or written agreement which shows an express or implied intention so to charge it; *Lillard v. Turner*, 16 B. Monroe, 374; *Burch v. Breckenridge*, Ib. 482; *Bell v. Kellar*, 13 Id. 384; and the rule is the same when land is in question, except that the contract must then be in writing; *Burch v. Breckenridge*. Such an intention will be implied from the execution of notes, bonds, or other instru-

ments of a like nature, by a married woman, which having no force, as personal obligations, can only be valid as a charge; *Bell v. Kellar*; *Burch v. Breckenridge*; or from any circumstance which shows that she meant the burden to fall on her separate estate, and did not contract solely on the credit of her husband; *Burch v. Breckenridge*; but cannot be inferred from the mere fact that the debt was incurred, in the absence of proof that she intended to pledge her property for its payment; *Coleman v. Woolley*, 16 B. Monroe, 320. And as the charge owes its origin to her will, it will not be carried further than she designs, and will be limited to the rents, issues and profits, unless it appears that she meant to pledge the principal or *corpus*; *Burch v. Breckenridge*.

The question was very fully examined in *Burch v. Breckenridge*, and the following language held by Simpson, J., in delivering the opinion of the court: "As a general rule, a married woman cannot, according to the common law, contract as a *feme sole*, nor as such, sue or be sued. That being the legal rule, courts of equity acting in conformity with it, have held that the wife cannot bind herself personally, nor bind her *separate estate*, by her general personal engagements. If, therefore, the wife contracts debts generally, without doing any act indicating an intention specifically to charge her separate estate with the payment of them, a court of equity will not direct an application of

such estate to be made for that purpose; (2 Roper, side page, 235; *Coleman v. Woolley's Ex'r*, 10 B. Monroe, 320.)

"Courts of equity, however, as a consequence of the doctrine established by them, that a married woman may have and enjoy separate estate, enable her to deal with it and to alien or encumber it, when she shows an intention so to dispose of it; but that intention must be manifest by her, otherwise her separate estate will not be held liable. Its liability for her debts does not arise out of their creation merely, but out of an agreement by her, either express or implied, that it shall be liable for their payment."

"It has been held by this court, that the execution by a *feme covert* of a bond or a promissory note, or the endorsement by her of a bill of exchange, should be regarded as a sufficient indication of her intention to charge her separate property with the payment of the debt. In such cases, although no reference be made to her separate case, the execution of the security is deemed to be an implied agreement on her part that it shall be liable for the demand (*Jarman, &c. v. Wilkerson*, 7 B. Monroe, 293; *Bell & Terry v. Kellar*, 13 Id. 384)."

"The extent to which her separate property may be subjected to the demands of creditors claiming under parol agreements, has not been determined by this court. So far as the separate property consists of land, it cannot be made liable by a verbal contract. The

wife cannot alien or dispose of her real estate except by a written agreement; and as a charge upon it for the payment of debts, operates as a disposition of it *pro tanto*, it can only be created by a contract in writing; (*Clark v. Miller*, 2 Atk. 379.) But with respect to other separate estate, consisting of personalty and slaves, where she has verbally agreed that part of it shall be appropriated to the payment of a debt which she is about to create, there seems to be no good reason why this agreement should not be regarded as constituting a charge upon it. Where, however, a verbal agreement is made, without any reference to her separate estate, then it will not be bound, unless the circumstances are sufficient to prove that, in fact, the understanding between her and the person with whom she has contracted was that it should be liable. But where there is no express agreement, and one arises only by implication, a court of equity will not allow such implied agreement to extend to any except that part of the estate which, it may be inferred from the circumstances, the wife intended to charge with the payment of the debt."

"Now, applying these principles to the demands asserted in the present suit, the right of the creditors to any relief, is very questionable. No express agreement by the wife to charge her separate estate for the payment of debts, was either alleged or proved. The mere fact that they were contracted by her, does not, as we have

seen, render her *separate estate* liable for their payment. Were they, then, contracted under such circumstances as will justify the presumption that the contracting parties understood that they were to be a charge upon her separate property? The wife did not, when the debts were created, live apart from her husband, nor is it shown that he was insolvent. The only circumstance from which it can be inferred that an understanding existed, both on her part and the part of the creditors, that the debts were to some extent to be a charge upon her *separate estate* is, that the accounts were created in the name of the trustee, as may be presumed, with her knowledge and consent, inasmuch as she executed receipts to him for some debts which had been created in the same manner, and had been paid by him. The agreement of the trustee, that her separate property should be liable for the debts, cannot create any charge upon it. Her own contract is indispensably necessary for this purpose; and such a contract on her part can only be implied in this case from the fact that she knew her creditors looked to her separate property for the payment of their debts, and with this knowledge, continued to deal with them, and permitted her trustee to pay the debts thus contracted by her, out of her estate. On this ground we think her separate estate should be chargeable with the payment of these debts."

"But the question still arises as to how far a court of equity will

extend this implied agreement by her, that her separate estate should be liable for the payment of these debts. They were all created merely for the current expenditures of the family; none of them arose out of a contract for the purchase of land or slaves, or for any property but such as would be consumed in the use. It cannot be presumed, in the absence of any express agreement to that effect, and without the execution of a security in writing, that she intended to create a charge on the principal of the estate, and subject it to sale for the payment of store accounts and other current family expenditures. The only reasonable and legitimate presumption is, that she intended the profits of her estate to defray her current expenses, and a court of equity should not carry the implication against her to any greater extent. If parties deal with a married woman without any express contract in reference to her separate property, they have no reason to complain if, in furnishing her with articles for consumption merely, they are restricted to the profits of her estate, and are not permitted to subject the estate itself to sale for the payment of their demands."

In *Hardy v. Van Harlingen*, 7 Ohio, N. S. 208, the court declined to express an opinion as to what the rule may be when real estate is in question, or when a gift is made to the separate use of a married woman by her husband or by any other person; but held that the effect of an

ante-nuptial agreement, in which it was stipulated that the wife should retain the entire control of a fund which had been bequeathed to her by her father, in as full and perfect a manner as if she were sole, was to invest her with an absolute power of disposition, under which she might bestow the whole on her husband as a gift; and the same point was decided in *Jenkins v. M'Conico*, 26 Alabama, 213.]

In Pennsylvania, the views of Chancellor Kent have been fully adopted, and it is firmly settled that a *feme covert* has no power in relation to her separate estate, but such as is expressly given to her in the deed of settlement; *Lancaster v. Dolan*, 1 Rawle, 231, 248; *Lyne's Ex'r v. Crouse et al.*, 1 Barr, 111; *Rogers v. Smith*, 4 Id. 93, 98; *Wright v. Brown*, 8 Wright, 244; *Wells v. McCall*, 14 P. F. Smith, 207. "The modern doctrine of [English] courts of equity," said Gibson, C. J., in *Thomas v. Folwell*, 2 Wharton, 11, 16, "is founded on what appears to be a misconception of the leading purpose of a settlement, which is obviously to disable the husband, and not to enable the wife, at least further than may be consistent with the security of her title, of which the grantor ought, in the particular case, to be the judge. The object is not so much to give her the dominion of a *feme sole*, which every man of experience knows would, in a countless number of instances, defeat the principal intent, as to withdraw the estate from the dominion

of the husband; and we might expect it to occur to those who are called to the interpretation of these instruments, that the surest way to accomplish this, would be to restrain the power of both. We therefore hold it to be the settled law of Pennsylvania, that instead of having every power from which she is not negatively debarred in the conveyance, she shall be deemed to have none but what is positively given or reserved to her." The bond of a married woman will not bind her estate; *Dorrance v. Scott*, 3 Wharton, 309, 316; and it appears, even, that her separate estate will not be liable upon her contracts for necessities, unless there be an express power to charge it given in the settlement, and then only where it is manifest that she intended to bind her separate estate; *Wallace v. Coston*, 9 Watts, 137, 138, and *Moravian Brethren v. Greenleaf and Wife*, there cited. In *Mackie v. Burroughs*, 14 Ohio, N. S. 519, the reasoning of Gibson, C. J., in *Thomas v. Folwell*, was said to be unanswerable, although the point was not actually determined.

[The fallacy of the argument on which this course of decision rests, seems to be, so far, at least, as the realty is in question, that a married woman has always had full power, in Pennsylvania, to dispose of land with the assent and concurrence of her husband, by a deed duly acknowledged, separately and apart from him. In order, therefore, to sustain *Lancaster v. Dolan*, and *Dorrance v. Scott*, it must be

contended, that a deed to the separate use of a *feme covert*, disables the wife, by taking away a power which she would confessedly possess, if the conveyance were made to her generally, an effect which can hardly be ascribed to a gift which purports to confer a full and unrestricted right of property. The disability may operate harshly by preventing a *feme covert* from obtaining the credit without which property may be of little use to the owner. An unproductive estate, which cannot be sold or mortgaged, or even charged with the costs of repairs and improvements, may have a prospective value, but is not available as a means of daily bread.]

In Rhode Island, Tennessee, and in Mississippi, the rule of the South Carolina cases and of Chancellor Kent, is adopted; and a *feme covert* is, as to her separate estate, a *feme sole*, only in so far as the settlement has expressly conferred on her the power of acting as such; she has no power over her separate estate, but such as has been specially given to her therein, which is to be strictly construed, and in exercising the power of disposition, she is restricted to the particular mode therein provided; her separate estate is, therefore, not liable upon a bond or promissory note executed by her with her husband, where the settlement has not expressly declared that it shall be liable; *Ware v. Sharp*, 1 Swan. 489; *Morgan v. Elam*, 4 Yerger, 375; *Marshall v. Stevens et als.*, 8 Humphreys, 159, 173; *Litton v. Bald-*

win et als., Id. 209; *Kirby v. Miller*, 4 Coldwell, 4; *Armstrong v. Stoval*, 26 Mississippi, 275; *Dotey et al. v. Mitchell*, 9 Smedes & Marshall, 435, 447; *Montgomery et al. v. The Agricultural Bank*, 10 Id. 567, 576; *Metcalf v. Cook*, 2 Rhode Island, 355; and a similar rule seems to have prevailed in Maryland; *Tarr v. Williams*, 4 Maryland, Ch. 68; *Williams v. Donaldson*, Ib. 414; *Miller v. Williamson*, 5 Maryland, 219; until the recent case of *Cooke v. Husbands*, 11 Maryland, 492, *ante*. In Virginia, the same view has been expressed in one case: "Upon the best reflection which I can give to this matter," said Tucker, P., "I am of opinion that a *feme covert*, holding separate property in real estate, by deed or will, prescribing a peculiar mode of any disposition, cannot dispose of it in any other mode, although the deed or will does not negative such other mode expressly;" *Williamson v. Buckingham*, 8 Leigh, 20, 27. But *Woodson's Trustee v. Perkins*, 5 Gratatan, 346, seems to adopt the English rule, while in *Nixon v. Rose*, 12 Id. 425, the court expressed the opinion, that although the *jus disponendi* is *prima facie* inherent in a gift to the separate use of a married woman, it may, notwithstanding, be withheld from her by the donor, and that she, consequently, cannot exercise it, where he declares his wish to be, to guard against an imprudent disposition of the property, and that he consequently confides it solely to the discretion of the trustee.

In North Carolina, the general principle appears to be left undetermined; but it has been decided, that a married woman may charge the profits of her separate estate in land, and dispose absolutely of her interest in personal property, by any instrument which refers to the estate, and denotes an intention to bind it; *Frazier v. Brownlow*, 3 Iredell's Equity, 237; *Harris v. Harris*, 7 Id. 111; see *Newlin v. Freeman*, 4 Id. 312, 316; but her separate property is not liable for debts contracted generally and not so charged; *Knox v. Jordan*, 5 Jones' Eq. 175; *Felton v. Reid*, 7 Jones, 269; see *Rogers v. Henton*, Phillips' Eq. 101. In Alabama and Kentucky, the earlier cases inclined toward the English rule; *Forrest et al. v. Robinson, Ex'r*, 4 Porter, 44, 50; *Sadler et ux. et al. v. Houston & Gillespie*, Id. 208, 211; *Long's Adm'r v. White's Adm'rs & Heirs*, 5 J. J. Marshall, 226, 230; which has been adopted unequivocally in the later. In *Bradford and Wife v. Greenway*; *Henry v. Smith*, 17 Alabama, 797, 805, the court said, "We hold, that where a married woman has property settled upon her, to her separate use, and the deed of settlement provides that she shall have 'the complete control of it, as though the marriage had never taken place,' and contains no restraint on alienation, she is to be deemed, in a court of equity, in respect to such property, a *feme sole*, and may, by her agreement, freely entered into, charge it for the payment of her husband's

debts. See, also, *Purveyor & Wallace v. Beard, Trustee*, 14 Alabama, 122, 134, and *Purveyor, Ex'r, v. Purveyor*, 16 Alabama, 486; *Collins v. Lavenburg*, 19 Id. 682.

[Agreeably to the main current of decision in the United States, a *feme covert* may dispose of her separate property by any means not inconsistent with the terms of the grant. See *Seacraft v. Hedden*, 3 Green Ch. 512, 550; *Pond v. Carpenter*, 12 Minnesota, 430, 432; *Penn v. Whitehead*, 17 Grat-tan, 503; *Dallas v. Heard*, 32 Georgia, 604. But it has been said that affirmative words conferring or prescribing a particular mode of disposition, or authorizing a sale or charge for a specific end, will preclude the right to alienate or encumber in a different manner or for a purpose of another kind.

In *Cook v. Husbands*, 11 Maryland, 492, 503, the rule in Maryland was declared to be that a *feme covert* may act in reference to her separate estate as a *feme sole* where there is no limitation to her power, but that when a mode of alienation or appointment is provided, it operates as a negation of any other mode, and is the paramount rule by which all parties must be governed in dealing with the estate. The better opinion, however, seems to be that the maxim *expressio unius exclusio est alterius*, should yield in cases of this description to the natural inference, that the gift of an unqualified right of ownership carries with it an equally unlimited power to dispose. The courts of

Missouri accordingly agree with those of New York and England, that although a particular mode of charge or disposition is indicated in the instrument by which property is settled or devised for the separate use of a married woman, she may still adopt any other mode, unless there are words limiting her to that which the instrument prescribes; *Kimm v. Weippert*, 46 Missouri, 532, 536.

The right to limit the power of alienation, or preclude it altogether, is, however, well established; and it follows that such a restraint may be implied when a different interpretation would defeat the purpose of the donor; *Weeks v. Sigo*, 9 Georgia, 201; *Nixon v. Rose*, 12 Grattan, 425; *Perkins v. Hays*, 3 Gray 405. See *Baker v. Bradley*, 7 De G. M. & G. 597. In *Cooke v. Husbands*, 11 Maryland, 492, 498, the court held, in obedience to the English authorities, that a devise to collect and pay over from time to time would not preclude the *feme covert* from anticipating the growing payments by an assignment, or subjecting them to the payment of debts.

On the other hand, in *Perkins v. Hays*, the testator's real and personal estate was devised "in trust yearly, and every year during the natural life of my said wife to pay or cause to be paid to her, or upon her separate order, in equal quarterly payments, the net sum of six thousand dollars, clear of all charges and deductions whatsoever; and in case of the incapacity of said annuitant through

sickness or any other cause, to receive herself or upon her separate order at any time during her life, the quarterly payments aforesaid, the said trustees shall pay or cause to be paid the same quarterly payments to any person or persons lawfully appointed to represent my said wife for the purpose of receiving the same; and in default of any person or persons lawfully appointed thereto, the said company shall pay or cause to be paid, the same quarterly payments to my executors hereinafter named, the survivors and survivor of them, to be by them applied to the support and maintenance of my said wife, and to the support, maintenance and education of my children under the age of twenty-one years."

The court said that a power to alienate by anticipation would defeat the paramount object of the will, which was to provide a fund for the use of the testator's wife as long as she should live, and for the support and education of his children during their minority. It was, therefore, as effectually excluded as if it had been prohibited in terms. It was held in like manner in *Nixon v. Bradley*, 6 Richardson, Eq. 43, that where taking the will as a whole, the testator manifestly designs to exclude the power of alienation, his intention will be carried into effect, although not expressed in any particular clause. A restraint on alienation will not preclude acts which are essential to possession and enjoyment, and a married woman may consequently execute a lease for a

short term, reserving the full yearly value of the premises, notwithstanding a clause in the settlement denying the right of anticipation; *Vandervoort v. Gould*, 36 New York, 639.

In *Ozley v. Ikelheimer*, 26 Alabama, 382; a written engagement for the payment of money by a *feme covert*, was held to imply an intention to make her separate estate answerable for its fulfilment. The English rule is expressly adopted in Connecticut; *Imlay v. Huntington*, 20 Connecticut, 149, 175. It has been said in Kentucky, that a *feme covert's* general personal engagements will not bind her separate estate; but, if she is living apart from her husband, her intention to charge it by debts which she contracts, is to be inferred; *Coleman v. Woolley's Ex'r*, 10 B. Monroe, 320; while the cases of *Bell v. Kellar*, 13 Id. 381; *Lillard v. Turner*, 16 Id. 374; and *Burch v. Breckenridge*, Ib. 482, decide that a similar inference is to be drawn from the execution or endorsement of a bill or note, or from any other act or contract by a married woman, which denotes an intention to bind her property, and not merely to go through the empty form of binding herself personally.

A similar view is taken in Missouri, although the courts of that state go further and to the full extent of the English doctrine; *Segond v. Garland*, 23 Missouri 547; *Schaforth v. Amba*, 46 Id. 114. In the case last cited *Bates, J.*, said, "It is settled

that where the *feme*, having a separate estate, executes a bond or note, or accepts a bill, it is held that she must intend by such instrument to bind her separate estate, because these acts would otherwise be nugatory, and these instruments could in no other way have any validity or operation (*Whiteside v. Cammon*, 23 Mo. 457). This applies as well where the woman endorses the note as where she is a maker."

A different rule prevails in New York and Massachusetts, under which the intention to charge the separate estate will not be inferred from the execution of a note or bond, nor unless it is expressed in terms in the contract, or results from the beneficial nature of the consideration as enuring directly to her use; *Yale v. Dedere*, 18 New York, 265; 21 Id.; *Willard v. Eastham*, 15 Gray. Accordingly, in a suit against a *feme covert* on such an instrument, the burden of proof is on the plaintiff to show that the circumstances under which it was executed were such as to render her liable; *Tracy v. Keith*, 11 Allen, 214.

In these instances the suit was founded upon an instrument in writing, but the principle is held to be the same when a wife makes an oral contract on the credit of her separate estate, although merely as a surety for her husband or for a third person. In *Miller v. Brown*, 47 Missouri, 504, *Bliss, J.*, said, "There were two leading theories. Agreeably to one of them, when the separate estate of a married woman was in

question, she was to be regarded as a *feme sole*, and might contract debts as though unmarried, for the payment of which her property would be answerable, and upon this theory it did not matter whether the debt was proved orally or evidenced by a written instrument, if it was established to be her debt. The other theory was that the grant of a separate estate did not give the wife a general credit based upon it, but simply a power of appointment or of disposition, uncontrolled by the husband, and she could only execute the power in accordance with its terms."

"It had been established in *Whitesides v. Cannon*, 23 Missouri, 457, in conformity with *Ozley v. Ikelheimer*, 26 Alabama, 332, that a *feme covert* may contract in the same manner as a *feme sole*, and that her contracts, whether verbal or written, are equally binding, and do not take effect as appointments, and this doctrine was sustained by the subsequent decisions; *Tuttle v. Hoag*, 46 Missouri 38; *Schaforth v. Amba*, 1b. 114. There was this difference, that when the wife put her name to a written instrument she could not deny that it was her agreement, whereas, when the promise was parol the presumption was that she bought on the credit of her husband, and the creditor could not recover without rebutting it by evidence."

It may be inferred in like manner, from the dicta in *Willard v. Eastham*, and *Yale v. Dederer* (*ante*, 740), that where the contract is

such in other respects as to bind the estate of the *feme covert*, it will not fail, because it is not reduced to writing, and such is the result to which we should be led by principle. It is the substance of the contract rather than its form which should be regarded when equity is enforcing an agreement which has no legal obligation. True policy requires that the property of a married woman should not be made answerable, except on an executed consideration moving directly to her use. Where no benefit can accrue from the transaction, it should not be a ground of charge; *Perkins v. Elliott*, 7 C. E. Greene, 278; 8 Id. 526, 532. "To the extent," said Ch. J. Beasley, "that the *feme* does any act which enables her to use or enjoy her separate estate, the principles of equity will validate such act, but beyond this limit she is not discover and cannot bind herself or her possessions." If this safeguard is laid aside, and the promise of a *feme covert* can be obligatory where she would not be liable on the consideration, it is, as Lord Brougham intimated in *Murray v. Barlee* (*ante*, 694), of little moment, whether she contracts by word of mouth or in writing. The weight of authority accordingly is, that a married woman may bind her separate estate by any contract, oral or written, which is sufficiently specific to indicate that she means to pledge her credit as a property holder, as distinguished from her husband's. The nature of the consideration, and whether it moves to her or to a third person, is im-

material, except as bearing on this question. She may consequently enter into an executory agreement for the sale or purchase of land or personalty, or may become a subscriber to a joint stock association, with the attendant liability to contribution if the company fails or a call is made upon the stockholders. See *Johnson v. Gallagher*, 30 L. H. Ch. 298; *Shattuck v. Shattuck*, Law Reports, 2 Equity, 182. Indeed, any one who admits that a note executed by a *feme covert* as a surety, may be enforced against her property, cannot well deny her power to charge it by a contract in which she is beneficially interested, although made improvidently, or with a view to speculative gain. The law was so held in *Mrs. Matthewman's case*, Law Rep. 3 Equity, 781, where the vice chancellor used the following language in delivering judgment: "If a married woman, having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which (if she were a *feme sole*) would constitute her a debtor, and in entering into such an engagement, she purports to contract, not for her husband, but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable; and the question whether the obligation was contracted in the manner I have mentioned, must depend upon the facts and

circumstances of each particular case."

"It clearly is not necessary that the contract should be in writing, because it is now admitted that if a married woman enters into a verbal contract, expressly making her separate estate liable, such contract would bind it; nor is it necessary that there should be any express reference made to the fact of there being such separate estate, for a bond or promissory note given by a married woman, without any mention of her separate estate, has long been held sufficient to make her separate estate liable. If the circumstances are such as to lead to the conclusion that she was contracting, not for her husband, but for herself, in respect of her separate estate, that separate estate will be liable to satisfy the obligation."

"Now if a married woman, having separate estate, can contract with another person, so as to render that estate liable, there seems to be no reason why she may not in like manner contract with a joint stock company; and if she may so contract to purchase a horse, a jewel, or any other chattel, there is surely no reason why she may not equally contract to buy shares in the company for her own separate use. And if she may thus purchase shares, she may of course stand as a share holder on the register (supposing there is nothing in the company's deed to prevent it), so as to make her separate estate liable in respect thereof; and if that is so, there is no reason why she should not be placed in like

manner upon the list of contributors."

The weight of authority seems to be in accordance with the able judgment of Lord Brougham, in *Murray v. Barlee*, 3 M. & K. 223; that where the contract is such in other respects as to create a charge, it need not be in writing though the property is land; *Keim v. Weppert*, 46 Missouri, 532; *Miller v. Brown*, 47 Id. 504; *Pond v. Carpenter*, 12 Minnesota, 432; *Yale v. Dederer*; *Willard v. Eastham*, ante; *Todd v. Lee*, 16 Wisconsin, 480; *Miller v. Newton*, 23 California, 554. No debt can be a charge which is not fastened on the separate estate by agreement, express or implied; but such a connection may arise from the nature of the consideration, or the circumstances under which the debt is incurred; *Yale v. Dederer*. A different rule prevails in Kentucky, under which the real estate of a *feme covert* is not liable for a debt contracted orally, even when the consideration consists of necessities furnished for her support; *Burch v. Breckenridge*, 16 B. Monroe, 482, 487; but this is founded on the opinion that the contract operates as an appointment, which is now discarded in England, and generally in the United States.

In England, the remedy of the creditor is confined to the rents and profits, where the separate estate consists of land. Here, as in other cases, equity follows the analogy of the law as a guide. In the United States, lands are chattels for the payment of debts,

and the real estate of a married woman may consequently be sold under a decree or execution, when there are no other means of providing for the fulfilment of her pecuniary obligation; *Turnan v. Pool*, 1 Gill. & J. 217; *Yale v. Dederer*, 21 Barb. 290; *Whitesides v. Cannon*, 23 Missouri, 457.

The question has become more important in this country from the passage of various statutes, which provide that the property of married women shall enure to their separate use, free from the debts or control of their husbands. It is held under these enactments, that a *feme covert* may grant or convey her real or personal estate by way of gift or sale, or may pledge or mortgage it for her own debt or for her husband's. In some of the States a transfer of the wife's personal property is not valid without the concurrence of the husband; *Perch v. Fries*, 3 C. E. Greene, 204; *Pond v. Carpenter*, 12 Minnesota, 430; *Townly v. Chapin*, 12 Allen, 476; and he is generally required to join in the conveyance when the subject matter is land; *Peck v. Ward*, 6 Harris, 506; *Dunham v. Wright*, 3 P. F. Smith, 167; *Ezell v. Parker*, 41 Mississippi, 520; *Mahon v. Gormley*, 12 Harris, 84; *Stoops v. Blackford*, 3 Casey, 217; *Richards v. McClelland*, 5 Id. 385; *Stevens v. Parrish*, 27 Ind. 260; *Cope v. Meeks*, 3 Head. 387; *Cole v. Van Riper*, 44 Illinois, 58; *Scovell v. Kelsey*, 46 Id. 344.

This course of decision is a logical sequence of the doctrine that the power of disposition is incident to the right of property; and

it follows for a like reason that the estate of a married woman is liable after coverture for debts contracted while she was sole. But it has been held with less foundation, that a married woman may incur liabilities which will bind her separate estate, whether secured to her by statute, or set apart specifically for her use by the donor. There is, said Harris, J., in *Yale v. Dederer*, 18 New York, 265, 279, in equity no difference between the separate estate of a wife, created by operation of the statutes of 1848 and 1849, relating to married women, and a similar estate created by deed or other instrument. This decision was cited and confirmed in *Ballin v. Dillaye*, 37 New York, 35.

In *Peake v. La Baw*, 6 C. E. Green's Ch. 282, the Chancellor said: "Since the passage of the married woman's act here, and of similar acts in other States, the courts have held certain contracts of married women to create charges on their separate estates, which will be enforced in equity. This was in analogy to the doctrine of equity, by which certain contracts made by married women, having estates held in trust for their separate use, were enforced in equity as against the trust. Debts contracted by them were paid only out of the income of the trust estate for the life of the woman."

"The courts of this country have declared the estates of married women, held under these acts, to be liable for debts contracted by them for the benefit of their sepa-

rate estates, or for their own benefit on the credit of these estates. But they go no farther than this. The Court of Appeals in New York, in the final decision in *Yale v. Dederer*, 22 N. Y. 450, held this to be the limit of the power of a married woman to charge her estate, unless done by an instrument properly executed for that purpose. The same doctrine is held by the Supreme Court of Massachusetts, in *Willard v. Eastham*, 15 Gray, 328. Chancellor Green, in *Johnston v. Commins*, 1 C. E. Green, 104, says: "It must be assumed that the wife had a separate estate, which she might lawfully charge with debts created for the benefit of the estate, or for her own support and benefit." And again: "In order to bind the estate, it must appear that the engagement was made in reference to and on the faith and credit of the estate."

"In the case of *Armstrong v. Ross*, 5 C. E. Green, 109, this court took the same view of the subject, and although it was not declared that the estate could not be made liable in any other way, the means of making her estate liable are so stated as to imply that they are the limit of the power."

Agreeably to the revised statutes of Kentucky, a *feme covert* cannot alienate property which has been conveyed to her separate use, nor can she charge or encumber it with her debts, unless her title is derived through a gift, and the power of alienation is conferred by the donor; *Williamson v. Williamson*, 18 B. Monroe, 385;

Hacker v. Wheelock, 3 Metcalf, Ky. 244. Her general estate, however, is liable for debts contracted for necessities, and evidenced by a writing signed by herself and her husband; *Marshall v. Miller*, 3 Metcalf, Ky. 333. See *Bowen v. Schel*, 2 Bush. 112.

In Minnesota, the liability of the property of a married woman for debts, results from, and is co-extensive with the power of alienation, but this cannot be exercised where her general estate is in question without the concurrence of her husband, or an order to that effect from the court; *Pond v. Carpenter*, 12 Minnesota, 430.

It might have been supposed, that the reasons which had led the courts of Pennsylvania to declare the separate property of a married woman inalienable, would have applied equally, whether the separate use was created by the donor, or arose by operation of law; or that if they were found to be untenable in the latter case, they would be abandoned in the former. But while a *feme covert* may, with the assent of her husband, dispose of her general estate, she is still under an entire disability where the separate use is limited specifically by a deed or will. This result is the more surprising, because the statute is broad enough to embrace all the property of a married woman, by whatever means acquired, and as it makes no distinction, none should seemingly have been introduced by the courts. A grant to a *feme covert*, is a grant to her separate use, by virtue of the statute, although nothing be said on the

point; and it is a general rule, that the expression of that which the law implies will not vary the result. In *Cummings' Appeal*, 1 Jones, 275, it was declared broadly, that a wife might dispose of her separate estate by will or otherwise, as if she were *sole*, and when the question arose in *Haines v. Ellis*, 12 Harris, 253, a deed by a husband and wife, of land which had been conveyed to the separate use of the wife, was held to confer a good and marketable title on the grantee; *Penn'a Co. v. Foster*, 11 Casey, 134. But in the subsequent case of *Wright v. Brown*, 8 Wright, 224, *Haines v. Ellis* was overruled, and the law reinstated on the basis of *Lancaster v. Dolan*. The court said, that the act of 1848, has no reference to estates conveyed for the separate use of married women, whether a trustee is named in the deed of settlement or not, and that the grantee has no power of alienation in either case, unless it is specially conferred in the instrument by which the estate is given. As no such power could be found in the will through which the mortgagor deduced her title in the case under consideration, the mortgage which she had executed was unauthorized and void. The same point was decided in *Shonk v. Brown*, 11 P. F. Smith, 320.

The question whether a contract void at law shall be enforced in equity as a charge on the separate estate of a *feme covert*, is a very different one from that of her power to convey. The right of disposition may carry with it a liability

to debts, but it will not render that a debt which would not have that character if the right did not exist. See *Peake v. Le Baw*, ante, 753. If, as all the authorities agree, the agreements of a *feme covert*, are destitute of legal obligation, in consequence of her inability to contract, they will not be rendered valid by a statute which does not profess to give the power which she lacks; *Jones v. Crossthwaite*, 17 Iowa, 397; *Kelso v. Taber*, 52 Barb. 125. In reply to this objection, it has been contended, that when a married woman manifests an intention to charge her separate estate, or the circumstances indicate that such is her design, equity will supply the want of a deed. In this aspect of the question, however, a writing would be requisite when the separate estate consists of land; and it is now abandoned in England, and generally in the United States; *Murray v. Baree*, 3 Mylne & Keen, 223; *Mrs. Mathewman's Case*, Law R. 3 Equity, 781. The courts of Pennsylvania are therefore logically accurate in holding that property which has been specifically set apart for the use of a woman, is not chargeable with any obligation incurred during coverture; *Dorrance v. Scott*, 3 Wharton, 309; and, although her general estate may be taken in execution for debts incurred for necessities furnished for the support of her family by virtue of the act of April 11th, 1848; *Caldwell v. Walters*, 6 Harris, 79, she cannot contract a debt or obligation of any other kind; *Bear v. Bear*,

9 Casey, 525; *Bruner's Appeal*, 11 Wright, 67.

The course of decision tends to an intermediate rule, under which the debts of a wife are like those of an infant, only binding where value is given in some form by which she can be benefited.

The subject underwent a critical examination in *Yale v. Dederer*, 21 Barb. 286; 18 New York, 265; 22 Id. 469; which was cited and followed in *Willard v. Eastham*, 15 Gray, 328, and the rule as now settled in New York and Massachusetts said to be, "that when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted, its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate or its income, to the extent to which the power of disposal by the married woman may go; but where she is a mere surety, or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against the estate, unless an express instrument makes the debt a charge upon it."

It has been held on like grounds, in numerous instances, that to render the general estate of a married woman liable, the debt must be contracted for the benefit of the estate, or for her benefit, on the credit of the estate, or the charge must be imposed in terms by the contract; *Yale v. Dederer*,

21 Barb. 286; 18 New York, 260; 22 Id. 450; *Keim v. Weippert*, 46 Missouri, 532, 534; *Peake v. Le Baw*, 6 C. E. Green, 269; *Armstrong v. Ross*, 5 Id. 109; *Seycreft v. Haddon*, 3 Green. Ch.; *Curtis v. Engel*, 2 Sandford, 287; *Jones v. Cowperthwaite*, 17 Iowa, 393, and it is established by these decisions that when the *res gestæ* are not such as to create a charge, and the plaintiff relies on a written contract, the intention to bind the estate must appear on the face of the instrument, and cannot be shown orally; *Yale v. Dederer*. This is equally true whether real or personal property is a question, and results not from the statute of frauds, but from the well settled principle that extrinsic evidence is not admissible to vary a written contract.

Under the rule now prevailing in New York, a married woman may charge her separate estate by a written contract, which implies that such is her design, although the consideration does not move to her, and she is merely a guarantor, surety, or indorser; but this results from the revised statutes of that state, which as amended in 1860, provide that a married woman "possessed of real estate as her separate property, may bargain, sell and convey such property, and enter into any contract with reference to the same;" *The Corn Exchange Ins. Co. v. Babcock*, 42 New York, 614.

The form of the obligation is immaterial, if the cause be adequate and the intention plain; *Gloss v. Warwick*, 4 Wright, 140; and it

has been held in New York, that a married woman may charge her separate estate by confessing judgment for a debt, which would have been a charge if the judgment had not been confessed; *The Bank v. Garlinghouse*, 36 Howard, New York, 369. And such is also the rule in Pennsylvania, where the record discloses a cause of action, for for which the *feme* is answerable; *Swayne v. Lyon*, 17 P. F. Smith, 436. It was indeed declared in *Keiper v. Helfricker*, 6 Wright, 325, that a warrant of attorney by a married woman to confess judgment, is invalid, though given for debts contracted before marriage, or for necessities for the support and maintenance of her family. So, in *Swayne v. Lyon*, Sharswood, J., said, that a judgment against a married woman, which does not show her liability, is a nullity. "This was the principle of *Caldwell v. Walters*, 6 Harris, 79. The declaration in that case being on a bond which was void, the judgment confessed upon it under the warrant of attorney was also void." It is notwithstanding established in the same State, that a judgment confessed by a *feme covert* on a bond and warrant of attorney given for the price of land, may be enforced by execution against the land; *Patterson v. Robinson*, 1 Casey, 81; *Ramberger v. Ingraham*, 2 Wright, 146. So, where a married woman mortgages her real estate and confesses judgment, the title will pass under an execution issued on the judgment; *Evans v. Myler*, 7 Harris, 402; *McCullough v. Wilson*, 9 Id. 436. In *Rambor-*

gerv. *Ingraham*, Lowrie, C. J., said that "a judgment confessed by a *feme covert* is valid on its face. It is by extraneous evidence that the court ascertains the coverture, and if the same evidence discloses that the consideration was the purchase-money of land which had been sold and conveyed to her, the judgment is valid as it regards such land, although it will not be a charge on property not embraced in the deed." If this be conceded, it is an inevitable inference, that whether a confession of judgment by a *feme covert* is void or valid, depends on the consideration, and not on what is disclosed of record; but the contrary is now established by *Keiper v. Helfricke*, and *Swayne v. Lyon*.

To charge the land of the wife with a debt contracted for the erection of a house upon it, or an improvement of any other kind, it must consequently appear that the work was done at her request, and on the credit of her separate estate; *Robinson v. Hoffman*, 15 B. Monroe, 80; *Hughes v. Peters*, 1 Caldwell, 67; and if the case is not made out in this respect, it will not be enough to show that she subsequently gave a note for a debt which was not hers; *Fetter v. Wilson*, 12 B. Monroe 90. In this point of view it makes no difference that the building was erected by her husband with her assent, because the obligation will still be his, and not a charge for which her property is answerable; *Finley's Appeal*, 17 P. F. Smith, 453; *Woodward v. Wilson*, 18 Id. 208; *Corning v. Lewis*, 36 Howard,

New York, 425. It does not vary the case that he obtained the credit by falsely representing the property to be his, *Corning v. Lewis*, unless the wife is shown to be a party to the fraud; *Matter v. Lillie*, 24 Howard, N. Y. 264. See *Lyman v. Cessford*, 15 Iowa, 229. If, however, the husband is insolvent at the time, creditors who have been delayed and hindered by the misappropriation of his assets, may file a bill to charge the land with the amount so laid out and expended; *Bart's Appeal*, 5 P. F. Smith, 386. But this equity does not arise where the debt is contracted without the assent of the wife, and notwithstanding her remonstrances. See *Rush v. Vought*, 5 P. F. Smith, 437; *Athey v. Knott*, 6 B. Monroe, 245; *Brown v. Wilson*. In *Webster v. Hildreth*, 33 Vermont, 437, the husband cleared a tract of wild land belonging to his wife, brought it into a state of cultivation, and erected buildings. The value rose in consequence from \$300, which she had given, to \$1,500, at the time of the suit. The improvement was due solely to his labor, and that of their children. Under these circumstances a bill was filed by his creditors to charge the land with his debts, but the court was of opinion, that as no agreement had been made between the husband and wife, he was a mere volunteer, who had acquired no right, and could confer none on others. A similar view was taken in *Rush v. Vought*, 5 P. F. Smith, 457. There is nothing in the marital relation to prevent a wife from em-

playing her husband, as an agent, in the management of her property and estate, and in the course of a business prosecuted for her benefit, and such employment will not render her capital, or the proceeds of the business in which it was invested, liable to the debts of her husband; *Sherman v. Elder*, 24 N. Y. 381; *Knapp v. Smith*, 27 Id. 277; *Buckley v. Wells*, 33 Id. 518; *Gage v. Dauchy*, 34 Id. 293; *Merchant v. Bunnell*, 3 Trans. ed. of Court of Appeals, 35; *Kluender v. Lynch*, 4 Keyes, 369. In *Gage v. Dauchy*, 34 N. Y. 293, where the wife was the owner of a farm, on which she resided with her husband, and which he managed in her name, without any agreement as to compensation, and it was held, that neither the products of the farm, nor the chattels for which they were sold or exchanged, could be attached by the husband's creditors. The point was decided in the same manner in *Rush v. Vought*, 5 P. F. Smith, 437; *Musser v. Gardner*, 16 Id. 242; *M'Intyre v. Knowlton*, 6 Allen, 565, and *Lewis v. Johns*, 24 California, 98.

That the fund belongs to the wife, will not, however, necessarily make the profits hers as against her husband or his creditors; and it may, on the contrary, be more just to regard the transaction as an advance or loan, which ought to enure to their benefit, subject to a reasonable allowance for rent or interest; *Gedden v. Taylor*, 16 Ohio, N. S. 509; *Elijah v. Taylor*, 37 Illinois, 247. Accordingly,

where the husband quarried stone on the wife's land, sold it, and took a receipt in his name, the fund was held to be his, and not hers, and liable to attachment for his debts; *Jordan v. Headman*, 11 P. F. Smith, 176. The court said it should have been shown that he acted under an agreement with her, or her trustees, in quarrying the stone, and that in the absence of such evidence, it was not enough that he had made the sale professedly on her account.

It has been held in Pennsylvania, that although the friends of the wife may contribute money as a gift, to establish her in business on her own account, they cannot make a similar advance by way of loan, although exclusively on her credit, without exposing the fund to be taken in execution for her husband's debts; *Hallowell v. Horter*, 11 Casey, 375. She may buy on credit, but if she does, and becomes insolvent, the property will be at the mercy of his creditors; *Robinson v. Wallace*, 3 Wright, 129; *Barringer v. Stiver*, 13 Id. 129. The effect of this decision is to preclude a woman who has nothing of her own from engaging in trade, unless she can find persons who are willing to give instead of lending; see *Hoffman v. Toner*, 13 Wright, 231. Where, however, a married woman borrows money on the faith of her estate, and invests it in business on her own account; goods purchased subsequently on the credit of the fund, belong to her individually, and cannot be

seized for the debts of her husband; *Brown v. Pendleton*, 10 P. F. Smith, 419.

It seems to have been taken for granted in many of the instances above cited, that a married woman may bind her land by a note or bond, although executed as a surety for her husband, or for a consideration moving to a third person, and the point was so adjudged in *Jarman v. Wilkinson*, 7 B. Monroe, 293; *Owen v. Cawley*, 36 New York, 600; and *Whitesides v. Cannon*, 23 Missouri, 437; but the recent course of decision tends to narrow the rule by establishing that, unless the charge results from the consideration, it cannot be imposed by contract; *Perkins v. Elliott*, 7 C. E. Green, 278; 8 Id. 526. A *feme covert* is in this aspect of the question a *feme sole*, as it regards her separate estate, so far as her needs, or those of the estate require, but she has no further power. It is for her sake, and not for that of the creditor, that equity intervenes to remove the disability imposed by the law. To render her debts chargeable on her estate, they must consequently be contracted on her credit, and for necessities furnished for her use in the improvement or repair of her property, or with a view to the prosecution of a business in which she is engaged as a *feme sole* trader; *Wilson v. Brown*, 2 Beasley, 277; *M'Cormick v. Hilbrook*, 22 Iowa, 487. If the goods or services are not sold or rendered on her credit, as distinguished from that of her husband, or if they do not fall within one

of the above categories, the suit will fail; and it will not be enough to show that the plaintiff sold at her request, or did some other act by which she was or might have been benefited; *M'Cormick v. Hilbrook*, 22 Iowa, 487; *Jones v. Crossthwaite*, 17 Iowa, 397; *Armstrong v. Ross*, 5 C. E. Green, 109; *Peake v. LeBaw*, 6 Id. 269; or that she executed an instrument declaring that her property should be liable for the payment of the debt; *Perkins v. Elliott*, 7 C. E. Green, 278; 8 Id. 526; *Kelso v. Tabor*, 52 Barb. 125. What are necessities in this, as in the analogous case of an infant, is a mixed question of law and fact depending upon all the circumstances of the case; *Mahoney v. Evans*, 1 P. F. Smith, 80; and if the estate of a married woman can be made answerable for food or clothing furnished for her own consumption, or that of her household, while she is living with a husband who is able and willing to supply her wants; *Moody v. Osgood*, 20 Barb. 50; *Hutchinson v. Underwood*, 27 Texas, 255; such a liability will not arise unless the debt was contracted on her credit, which is not necessarily established by showing that the goods were charged to her, or sent at her request. *A fortiori*, a recovery cannot be had consistently with this principle on a note given for her husband's debts, or as a surety for him; *Yale v. Dederer*; if it does not express an intention to charge her estate with the debt, or agreeably to the weight of authority, when it does; *Kelso v. Tabor*, 52

Barb. 125. See *Ledlie v. Vrooman*, 41 Id. 109; *Coates v. M'Kee*, 26 Indiana, 233; *Perkins v. Elliott*, 7 C. E. Greene, 278; 8 Id. 526. And for a like reason, a promise by a married woman to pay for the support and maintenance of an aged parent, although binding in morals, will not be enforced by equity against her separate property; *Manchester v. Sahler*, 47 Barb. 155.

Debts contracted by a wife for necessities for the support and maintenance of her family are, however, universally conceded to be a charge upon her general property; *Murray v. Keyes*, 11 Casey, 384; *Bear's Est.*, 10 P. F. Smith, 430; although the creditor must aver and prove first, that the goods were necessities, and next, that they were sold on her credit; *Murray v. Keyes*; *Parke v. Klauber*, 1 Wright, 251; and a declaration which fails in either respect will be bad after verdict; *Parke v. Klauber*; or although she appears and confesses judgment; *Swayne v. Lyon*, 13 P. F. Smith, 436.

Proof that the wife ordered the goods will not justify the inference that she meant to charge her land or chattels, or that the vendor looked to her for payment. The presumption is that credit was given to the husband, and that she acted as his agent. Where, however, a married woman is living apart from her husband, this presumption does not arise, and it may reasonably be inferred that her estate is secondarily, if not

primarily, liable for the debt; *Johnson v. Cummings*, 1 C. E. Green, 97; *Burke v. Cole*, 97 Mass. 113.

In *Johnson v. Cummings*, the chancellor said the "general principle is that a married woman is enabled in equity to contract debts in regard to the separate estate, and that the estate will be subject in equity to the payment of such debts. In order to bind the separate estate, it must appear that the engagement was made in reference to and upon the faith and credit of the estate. But where a married woman, living apart from her husband and having a separate estate, contracts debts, the court will impute to her the intention of dealing with her separate estate, unless the contrary is shown; *Owens v. Dickenson*, 1 Craig & Ph. 48; 2 Story's Eq. Jur. § 1401, § 1401 a.; 1 Leading Cases in Eq. 406."

It is not requisite that the husband should be insolvent when the debt is contracted. Although his means are ample, the wife may, if she think proper, pledge her credit or her general estate; *Davidson v. M'Candlish*, 19 P. F. Smith, 169; *Rigoney v. Neiman*, 23 Id. 330. In Pennsylvania an execution must go against him, and be returned *nulla bona* before the wife's property can be touched; *Bear's Estate*, 10 P. F. Smith, 430; and a recovery cannot be had against her after his death for a debt contracted during coverture, until such a settlement has been had of his estate before the

appropriate tribunal as to show that it does not afford the means of payment.

It is, therefore, a good defence in Pennsylvania to a suit brought against a husband and wife, as a means of charging her land or goods, that the debt was contracted without his express or implied assent, and that she was supplied by him with all things needful, and it will make no difference in the application of the principle that the wife bought on her credit and not on his, because she might otherwise charge him indefinitely, contrary to the doctrine of the common law.

The presumption that a married woman who resides with her husband buys on his credit, is not conclusive, and if she desires to purchase comforts which he cannot or will not afford, the vendor may, as it seems, sell on the credit of her estate without inquiring into the extent or adequacy of the husband's means, or whether he neglects to provide sufficiently for his household; *Bear's Estate*, 4 P. F. Smith, 430; *Davidson v. M'Candlish*, 19 Id. 169; *Miller v. Newton*, 23 California, 554; *Case v. Simple*, 13 Iowa, 596.

Accordingly, where a wife purchased clothing for herself and her children, and it appeared in evidence that the sale was made, and the goods charged to her individually, the court held that the question was one of fact, whether the debt was contracted on her credit, and that if it was, the mere circumstance that she was living with her husband, and that it was his duty

to maintain his family, would not protect her estate from liability; *Miller v. Brown*, 47 Missouri, 504. Bliss, J., said the practical inquiry was not whether the married woman intended to charge her separate property, but whether she intended to contract a debt of her own, for if she did, the law would impose the charge without regard to her ideas upon the subject. It did not appear that the articles of clothing sold by the plaintiff were necessaries which the husband was bound to furnish, or that he had the requisite means, but if these questions were answered affirmatively, the wife might still buy on the credit of her estate.

In Pennsylvania, however, the power of a married woman to bind her estate is limited under the provisions of the act of 1848 to necessaries, in the broad sense in which that term includes everything that is requisite and suitable to the fortune, rank and occupation of the person who buys; *Mahony v. Evans*, 1 P. F. Smith, 80; *Davidson v. M'Candlish*, 19 Id. 169. Work done and materials furnished for the repair and preservation of the real estate of a married woman, are within this principle, if it appears that the plaintiff acted at her request, and not on the credit of her husband; *Lippincott v. Hopkins*, 7 P. F. Smith, 328; *Moore v. McMillen*, 23 Indiana, 78. And where the power of a married woman extends generally to charging her estate with any obligation incurred for herself or others, it may be liable for a debt contracted for the construction of dwellings,

barns, mills, outhouses, drains, or in short for any improvement made at her request; *Hauptman v. Catlin*, 20 New York, 247; *Morse v. Mason*, 103 Mass. 560; *Packer v. Kane*, 4 Allen, 346; *Marshall v. Miller*, 3 Metcalfe, Ky. 333.

For like reasons, where a married woman engaged in business as a *feme sole* trader, buys as such, and the goods are so charged, her general estate will be liable for the debt; *Penn v. Whitehead*, 17 Grattan, 503; *Tallman v. Schackleton*, 15 Michigan, 447; *Carter v. Isaacs*, 1 Robertson, 176; *Todd v. Lee*, 15 Wisconsin, 365; *Tuttle v. Hoag*, 46 Missouri, 38, 43. If the point has not been expressly decided in Pennsylvania, it is a necessary inference from *Wireman v. Anderson*, 6 Wright, 311, and *Welch v. Kline*, 7 P. F. Smith, 428. The property in question, said Woodward, J., in *Wireman v. Anderson*, is merchandise, and it is the nature of merchandise to be sold and exchanged. When, therefore, the statute authorizes married women to own, use and enjoy merchandise as their separate property, it legalizes trade by them; it makes them merchants."

The principle is applicable, although the husband resides with his wife and acts as her agent. If the business is prosecuted in her name, with her funds, and for her benefit, the profits will be hers; *Wireman v. Anderson*, *Kelch v. Kline*; and, as a necessary consequence, her estate will be liable for the debts. In *Turtle v. Hoag*, the

Court said it was established in Missouri on the authority of *Coughlin v. Ryan*, 43 Missouri, 99, that where a wife carries on business on her sole and separate account, all that she earns will be deemed to be her separate property, and disposable by her as such. So in Vermont, where a husband suffered his wife to set up the millinery business in her own name, and to manage it at her own discretion, he having nothing to do with making the purchases, keeping the accounts, or paying the debts of the business, and having furnished no capital for which he had not been paid, and having no communication with those of whom his wife made purchases, it was held that on equitable principles the stock and property in the millinery shop should be treated as the property of the wife, and be held liable for her debts, and subject to the demands affecting it; *Partridge v. Stocker*, 36 Vermont, 108. The nature of the business does not vary the principle; and the separate estate of a wife is consequently answerable for the price of cattle or implements of husbandry purchased for use on a farm, which she holds and cultivates as her separate property, or for her own account; *Bachelder v. Sargent*, 47 New Hampshire, 462; *M'Cormick v. Holbrook*, 22 Iowa, 487. So a bull may be necessary to an infant, or feme covert, who owns or conducts a dairy farm; *Mohney v. Evans*, 1 P. F. Smith, 80. The rent of a shop taken by a feme sole trader is in like manner a neces-

sary charge, without which she could not prosecute her business; *Castor v. Isaacs*, 1 Robinson, 176; *Burdick v. Moon*, 24 Iowa, 418. In the *N. A. Coal Co. v. Dyett*, 7 Paige, 9, a recovery was had on a like ground for coal furnished for the consumption of a factory held in trust for the separate use of the defendant.

It seems to have been thought in *Jones v. Crossthwaite*, 17 Iowa, 397, and *M' Cormick v. Holbrook*, that the sale of an article appropriated to the occupation or condition in life of a feme covert, may be impeached by evidence that she bought with a view to a speculative rise in price, or the profit to be derived from a resale. To render the object of the buyer material to the obligation of the contract, it must, however, obviously be known to the seller. And it would seem that where such a transaction is good on its face, it cannot be invalidated by the use to which the property is put by the feme covert.

It is held in general, that when the sale is made on the credit of the wife's separate property, the husband is not chargeable, and no recovery can be had against him; *Tuttle v. Hoag*; *Taylor v. Shelton*, 30 Conn. 122; *Sawyer v. Cutting*, 33 Vermont, 486; *Carter v. Howard*, 39 Vermont, 106; *Weiser v. Lowenthal*, 31 Maryland, 413; *Metcalfe v. Shaw*, 3 Campbell, 122. A different rule has been established in Pennsylvania by statute, and execution cannot go against the wife until a *fi. fa.* has

been issued against the husband, and returned *nulla bona, ante*.

It is generally conceded that a recovery may be had against the estate of a married woman, for medical attendance on herself, or her family at her request; and a charge for counsel fees rests on an analagous basis. If a married woman may conduct agricultural operations, engage in trade, and improve her separate property or contract as a surety or vendor, she may obviously stand in need of the advice of men learned in the law, and the professional services rendered in such cases will consequently be a charge on her property, whether general or held for her separate use; *Owen v. Cawley*, 36 New York, 600; *Leonard v. Rogan*, 20 Wisconsin, 520; *Major v. Symmes*, 19 Indiana, 117.

Where the power of a feme covert to contract is limited to necessities, it does not extend to binding her property by a note or bond given for the price of land; *Carpenter v. Mitchell*, 50 Illinois, 470; *Ames v. Wooster*, 42 New Hampshire, 381; *Howe v. Wilders*, 34 Maine, 566; *Jones v. Crossthwaite*, 17 Iowa, 533; and the obligation cannot be enforced as such, even as against the land itself. If, however, the vendor neglects to take a mortgage, a court of equity may, to prevent an entire failure of justice, direct the premises to be sold, and the proceeds appropriated to the payment of the price; *Carpenter v. Mitchell*; *Wilson v. Brown*, 2 Beasley, 277; *Ramberger v. Ingrahm*, 2 Wright,

146; *Glass v. Warwick*, 4 Id. 140; *Rogers v. Ward*, 8 Allen, 387. So where the trustee of a married woman gave his note for the lease and furniture of a hotel, which were assigned to him for her separate use, the debt was enforced against the property so bought; *Lewis v. Harris*, 4 Metcalf, Ky. 353; *Pemberton v. Johnson*, 40 Missouri, 342. A judgment confessed by a *feme covert* for purchase money, is in like manner, by an exception to the general course of decision in Pennsylvania, a valid charge under which the land may be taken in execution and sold by the sheriff; *Ramsberger v. Ingraham*; *Patterson v. Robinson*, 1 Casey.

Where the power of a married woman extends to charging her separate property by any contract manifesting such a design, it will, of course, be bound by a note or bond, given for the price of land conveyed to her, or to a third person, at her instance; see *Binn v. Weppert*, 46 Missouri, 532. And where this rule prevails, a charge may also result from a contract for the purchase of land or chattels: *Binner v. Wheaton*, 46 Missouri, 363; see *Ballin v. Dilaye*, 37 New York, 35. The liability of the separate estate of the wife under the covenants for title in a grant by herself and her husband, has been asserted in some instances; *Gimber v. Williams*, 14 Alabama, 461, and denied in others; *Dean v. Shelly*; but this, as it would seem, depends on whether the property conveyed, belongs to her, for if it does, she presumably receives an equivalent

in an increase of price; *White v. Nitt*, 33 New York, 371; see *Richmond v. Tribbles*, 26 Iowa, 474. The principle is the same when she sells a note or bond and guarantees the debt; *White v. Nitt*.

It is generally conceded that a married woman may charge property which she has power to sell or alienate by a bond and mortgage, executed for the benefit of her husband, or as a surety for a third person; *Black v. Galway*, 12 Harris, 18; *Miner v. Graham*, Ib. 491; *Bartlett v. Bartlett*, 4 Allen, 440; *Patton v. Kinsman*, 17 Iowa, 428; *Wolfe v. Van Metre*, 19 Id. 136; 23 Id. 404; *Watson v. Thurber*, 11 Michigan, 457; *Ellis v. Kenyon*, 25 Indiana, 134.

Under these circumstances, the bond is invalid as such, but the land is bound not only in equity, but at law; *Galway v. Fullerton*, 2 C. E. Green, Ch. 389; *Glass v. Warwick*, 4 Wright, 140; and the principle is the same where personal property is pledged or mortgaged; *Pomeroy v. The Manhattan Ins. Co.*, 40 Illinois, 398; *Young v. Graff*, 28 Id. 20.

Where the wife is a surety, or the consideration does not move to her, the charge will not be binding, unless it is imposed in the form prescribed by law. But in *Wilson v. Brown*, 2 Beasley, 277, a mortgage given for the price of land bought by the wife, which failed in consequence of the non-joinder of the husband, was sustained as an equitable incumbrance on the land conveyed.

The better opinion would seem to be, that a contract of sale by a

married woman, which does not pass the title, cannot be made the foundation of a claim for compensation in the nature of damages; and it is well settled that when the concurrence of the husband, or a separate acknowledgment by the wife, is essential to the validity of a deed, the rule cannot be evaded by substituting an agreement to convey for a present grant: *Rumfeldt v. Clemens*, 10 Wright, 455; *Glidden v. Strupler*, 2 P. F. Smith, 400. Such a contract will consequently fail, unless it is executed with all the forms that are requisite to the validity of a grant. The law was so held in *Glidden v. Strupler*, although the purchaser had paid the price, entered into possession, and made valuable improvements with her knowledge and assent. The court said that an equitable estoppel might have arisen on this evidence in the case of a person who was *sui juris*, but that if the title of a married woman could be divested by acts in pais, she would lose the safeguards given by the common law and by statute. See 2 Smith's Leading Cases, 726, 7 Am. ed. In these instances the articles of agreement were not acknowledged by the wife, or signed by the husband, and it has been determined that if he joins in such an instrument, and it is verified by her separate acknowledgment, the contract is valid, and may be specifically enforced by a chancellor; *Dankel v. Hunter*, 11 P. F. Smith, 382; *Schofroth v. Amba*, 46 Missouri, 114; *Love v. Watkins*, 40 California, 547. See *Vance v.*

Nagle, 20 P. F. Smith, 176; *M'Aboy v. Johns*, Ib. 9; *Hamilton v. Taylor*, 2 Cincinnati, 402; *Hinckley v. Smith*, 51 New York, 21; *Clayton v. Frazer*, 33 Texas, 91; *Kingsley v. Gelman*, 15 Minnesota, 59.

Trusts designed to protect the rights of the wife, against an undue exercise of the power of the husband, can only, from their nature, be effectual where the relation of husband and wife exists, and while it is still in being; and, hence, property held for the separate use of a *feme sole*, before marriage, or of a widow, after the death of the husband, is absolutely subject to her control and disposition, even when the gift contains an express restraint on the power of alienation; *Tullet v. Armstrong*, 1 Beavan, 1; 4 Mylne & Craige, 390; *Scarborough v. Bowman*, 1 Beavan, 34; 4 Mylne & Craig, 377; *Clarke v. Wyndham*, 12 Alabama, 789; *Miller v. Bingham*, 1 Iredell's Equity, 423; *Smith v. Stair*, 3 Wharton, 62; *Hammersley v. Smith*, 4 Id. 126.

This results from the rule that the power of alienation is incident to ownership, and that creditors are entitled to the benefit of every right that can be exercised by the debtor; *Brandon v. Robinson*, 18 Vesey, 429; *Hallett v. Thompson*, 5 Paige, 383; *Dick v. Pitch*, 1 Dev. & Bat. Eq. 480; *The Blackstone Bank v. Davis*, 21 Pick. 42; *Hammersley v. Smith*, 4 Wharton, 126; *Nickel v. Hanly*, 10 Grat-tan, 336; 1 Smith's Leading Cases, 118, 721, 7 Am. ed.; which may be temporarily suspended by the disability of coverture; but revives

as of course, on the death of the husband. At common law a married woman cannot make a valid grant or contract, and equity may impose or sanction a similar restriction in accordance with legal analogy, but it cannot fetter the hands of a *feme sole* consistently with well-established principles. *Hammersley v. Smith*, 4 Wharton, 126. Estates for life or years, not extending beyond a life or lives in being, and twenty-one years afterwards, may be subjected to a condition against alienation, with a limitation over in case of breach, which would be void if attached to an estate in tail or fee; *Rockford v. Hackman*, 9 Hare, 475; 10 Eng. Law & Eq. 68; 1 Smith's Leading Cases, 119, 721, 7 Am. ed. But the English courts adhere inflexibly to the principle, that no interest can be retained by or held for a debtor, without being subject to his debts, and that the only way to exclude the claims of creditors, or preclude alienation, is to provide that the estate shall determine if taken in execution or conveyed; *Hill on Trustees*, 395. The question was examined with much ability in the recent case of *Nicholson v. Miller*, 10 Grattan, 334, 343, by Manning, J., who held the following language in the course of his opinion, which, although overruled on the point before the court, may be taken as a safe guide to the general rule of law: "Property has certain legal incidents, of which it cannot be divested; and all conditions adopted for that purpose are necessarily repugnant and void: one of these

incidents is, its liability for the debts of its owner. 'Upon the principle which forbids the disposition of property divested of its legal incidents, it is clear that no exemption can be created by the author of the gift from its liability to the debts of the donee; and property cannot be so settled as to be unaffected by bankruptcy or insolvency, which is a transfer by operation of law of the whole estate; and it is immaterial for this purpose what is the extent of interest conferred by the gift, the principle being no less applicable to a life interest, than to an absolute or transmissible property. Whatever remained in the bankrupt or insolvent debtor at the time of his bankruptcy or insolvency, becomes vested in the person or persons on whom the law, in such event, has cast the property.' This is the language used in 1 Jarman on Wills, 816, and it is fully sustained by the authorities therein cited. 'There is no doubt,' as Lord Eldon said, in *Brandon v. Robinson*, 18 Ves. R. 429, 'that property may be given to a man until he shall become bankrupt; it is equally clear, generally speaking, that if property be given to a man for his life, the donor cannot take away the incidents to a life estate; and a disposition to a man until he shall become bankrupt, and after his bankruptcy is over, is quite different from an attempt to give it to him for his life, with a proviso that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short

of a life estate, neither the man nor his assignees can have it beyond the period limited.' The condition must determine the interest, or it is repugnant and void. The continuance of the interest and its exemption from liability for the debts of the owner, is a legal impossibility.

"The case of a settlement on a married woman, or in reference to coverture, is an apparent exception to the rule that conditions restraining the power of alienation and exempting property from liability for the debts of its owner, are repugnant and void. But a *feme covert* can own no property at law. Separate property is a creature of equity. And as equity confers the power of alienation as an incident to the trust for separate use, it allows the power to be modified as convenience or the exigency of the case may require. 'When this Court (says Lord Cottenham,) first established the separate estate, it violated the laws of property as between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate; and it was found as a part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by an another violation of the laws of property, supported the validity of the prohibition against alienation.' *Tullet v. Armstrong*, 4 Mylne & Craig, 377. But this doctrine is not applicable

to unmarried women, a restriction on the aliening power of a woman not under coverture, being no less inoperative than a similar restraint on the *jus disponendi* of a person of the male sex. 1 Jarman on Wills, 830. And even in a case of a settlement on a married woman, a restriction on her power of alienation is confined to the coverture, and begins and ceases with it; so that when she becomes discover, she has the same power of disposition over her property as other persons; *Id.*; *Barton v. Briscoe*, Jacob's R. 603; *Jones v. Salter*, 2 Russ. & Myl. 208; 6 Cond. Eng. Ch. R. 463; *Woodmeston v. Walker*, 2 Id. 197; 6 Cond. Eng. Ch. R. 457; and of course it is as much liable for her debts as is the property of other persons for their debts."

It was held in like manner in *Clarke v. Wyndham*, 12 Ala. 800, that a restraint on alienation in a gift to the separate use of a married woman comes to an end on the termination of the coverture, and will not preclude her from disposing of the property in any manner which she may think proper. It will make no difference in the application of this rule, that the settlement provides that the fund shall not be aliened by or paid over to the *cestui que trust* in any event; and her receipt while *sui juris* and discover will discharge the trustee, notwithstanding any such provision; *Harris v. Brolaskey*, 3 Harris, 299.

In *Massey v. Parker*, 2 Mylne & Keene, 174, the court went beyond the legitimate consequence

of these premises, by holding that a trust for the separate use of a married woman failed when she became discover, and was not restored by a subsequent marriage. The second husband consequently took the fund, which consisted of personalty. It was said that to render such a limitation effectual, it must be imposed during coverture, or with reference to a marriage then in contemplation. This view was adopted in *Hammersley v. Smith*, 4 Wharton, 126, and a second marriage held not to revive a trust for the separate use of a *feme covert* which had ceased when she became a widow. In *Snyder v. Snyder*, 10 Barr, 423, this decision was overlooked or disregarded, and an oral gift of chattels to the separate use of a woman during her first marriage, sustained against the executors of the second husband. When, however, the question arose in *McBride v. Smyth*, 4 P. F. Smith, 245, the court reverted to the doctrine of *Hammersley v. Smith*, and it was said that to render a trust of this description valid, the woman must be married at the time, or have contracted a matrimonial engagement which is known to the donor. A second marriage was, therefore, necessarily beyond the scope of the trust; *Wells v. M'Call*, 14 P. F. Smith, 207, 214.

It follows logically from the doctrine of *Hammersley v. Smith*, that as a separate use cannot be upheld against a second husband, so it cannot be raised before coverture, or while the *cestui que trust* is unmarried; *Wells v. M'Call*, 14

P. F. Smith, 207, 214. In *Mac Bride v. Smith*, 4 P. F. Smith, 245, it was accordingly held on the authority of *Potts' Appeal*, 6 Casey, 168, and *Dubs v. Dubs*, 7 Idem, 149, that such a trust cannot be effectually declared for a *feme sole*, except in the immediate contemplation of her marriage. This rule was affirmed in *Wells v. M'Call*, 14 P. F. Smith, 207, and *Springer v. Arundel*, Ib. 218, where Agnew, J., said, that "such a trust would be supported, although the woman had been unmarried if it was declared in immediate contemplation of marriage. Immediate contemplation of marriage meant, in contemplation of an immediate marriage; one presently in view of the donor and to occur in a short time after the instrument took effect; and it might be inferred from the language of Chief Justice Gibson, that the donor must also know the intended husband, and intend to guard against his improvidence." But it was at the same time held, that this need not appear on the face of the instrument, or even from extrinsic evidence, and must be inferred as matter of law, from the solemnization of the marriage soon after the creation of the trust. In *Springer v. Arundel*, land was devised to the separate use of her niece, Mary Rogers. The devisee married two days after the death of the testatrix; but there was no evidence of a previous engagement, or that her purpose was known to the latter. Under these circumstances it might have been thought that there was no adequate ground for an inference that the testatrix

knew of or contemplated the marriage, but the separate use was notwithstanding upheld.

The rule laid down in *MacBride v. Smith*, is obviously a harsh one, as preventing a father who does not live long enough to see his daughter married, from making an adequate provision against the misfortunes or improvidence of the husband whom she may choose after he is gone. The argument *ab inconvenienti* will not avail against an established legal doctrine. But there is no principle of law or equity which forbids the creation of a shifting use to vest on the happening of a future and contingent event; *M'Williams v. Nisby*, 2 S. & R. 507, 512. Such limitations are well known in English conveyancing, and have frequently been sustained by the courts.

This is virtually conceded in Pennsylvania, where a trust for the separate use of a woman who is about to be married, may vary with the course of her affections. Such a case may present three different aspects; one during the engagement, another after the solemnization of the marriage, another still, should either party determine to live single or to wed some one else. If, as we must presume, the restraint on alienation ceases with the rupture of the match, will it revive on a renewal of the engagement, or should the lady finally take the man as her husband? Must the marriage occur immediately after the declaration of the trust, or may it be deferred for a reasonable time, and what is a

reasonable time under these circumstances? The difference between the English and Pennsylvania rule, when critically examined, is reduced to this: that agreeably to the view which prevails in Pennsylvania, a trust for the separate use of a woman, must be designed to exclude the debts or control of a particular individual to whom she is married or engaged, or whom the donor expects or intends her to marry. Such a distinction can hardly be reconciled with principle, or the solicitude to protect wives against their husbands, which is the key note of *Lancaster v. Dorlan*, and *Thomas v. Folwell*. In providing for the future of an unmarried female, a prudent man may as reasonably desire to guard against the undue influence or improvidence of a husband whom he does not know, as of one whom he does.

The main current of authority accordingly is, that a trust for the separate use of an unmarried woman takes effect in the event of coverture, unless defeated by some act done by her while sole, and although necessarily suspended during widowhood, will be good on re-marriage as against the second husband. The law has been so held in several instances in this country; *Beauford v. Collins*, 6 Humphreys, 487, 491; *Roberts v. West*, 15 Georgia, 123; *Shirley v. Shirley*, 9 Paige, 364; *Waters v. Tazewell*, 9 Maryland, 291; *Phillips v. Grayson*, 23 Ark. 769; *Nix v. Bradley*, 6 Richardson's Eq. 43; and it is now established in England under *Tullett*

v. *Armstrong*, and *Scarborough v. Borman*, ante 715; that the validity of a clause excluding the power of the husband, or restraining that of the wife, depends on her condition when the power is exercised, and not on whether she is married or single at the time when the settlement is made or deed executed, and that while a woman may dispose absolutely of her property before marriage or after the death of her husband, notwithstanding a declaration that it shall be held for her separate use, and without the power of anticipation, the trust will revive for her protection with each succeeding coverture, if she does not alien the property during the intermediate period; 1 Smith's Lead. Cases, 721, 7 Am. ed. notes to *Mitchell v. Reynolds*. The law was so held in *In re Gaffee*, 7 Hare, 101; 1 Mac. & G. 541, overruling the decision of the court below; and a restraint on the power of alienation in a settlement for the separate use of a married woman, said to be as effectual during a second coverture as it was in the first instance, unless the instrument is so worded as to lead to a different result. It was decided in like manner in *Nix v. Bradley*, 6 Richardson's Equity, 43, that although a woman may, while *sui juris* and unmarried, dispose absolutely of property which has been conveyed to her separate use, without the power of anticipation, the restraint will attach upon a subsequent marriage, and preclude the right of alienation.

It results from these decisions

that when property of any kind is conveyed to the separate use of a woman for life, or in fee, with a proviso that she shall not alienate the same, or anticipate the proceeds thereof, her hands will be as effectually tied during a subsequent coverture, as if it had existed when the trust was originally declared; 1 Smith's Leading Cases, 118, 721, 7 Am. ed.; *Brown v. Bamford*, 1 Phillips, 620; *Baggett v. Mues*, Ib. 627; *Peillon v. Brooking*, 25 Beavan, 218.

It seems to have been thought in *Wells v. M'Call*, 14 P. F. Smith, 207, 213, that a restraint on alienation is necessarily repugnant and void where the grant is in fee, but the material question seems to be not the quantity of the estate, but for what purpose the restraint is imposed, and how long it is to continue; *M'Williams v. Nisby*, 2 S. & R. 507, 513; *Fisher v. Taylor*, 2 Rawle, 33; *Barker v. Cobb*, 36 New Hampshire, 345. A condition that an estate in fee shall not be sold or conveyed, during the life of the grantee, though invalid as such under the strict rule of the common law, may, when imposed for a good or useful purpose be good in equity, or as a limitation of a springing use; *M'Williams v. Nisby*. See 1 Smith's Lead. Cases, 119, 7 Am. ed. What the common law does not tolerate is, that creditors shall be debarred from any right which resides in the debtor, and can be enforced by him; *Brandon v. Robinson*, 18 Vesey, 492; *Hammersley v.*

Smith, 4 Wharton, 126. In *Hammersley v. Smith*, Gibson C. J., said, "the principle has its root in *Brandon v. Robinson*, where it was held that although property may be so limited as to cease or go over on the happening of a contingency, yet, that while it remains in the donee, it is so far subject to the legal incidents of ownership, as to be insusceptible of a restriction which would exempt it from liability to his creditors." So in *Rochford v. Hackman*, 9 Hare, 89, two things were said to be clear: "First, that property cannot be given for life, any more than absolutely, without the power of alienation being incident to the gift, and that any mere attempt to restrict the power of alienation, whether applied to an absolute interest, or to a life estate, is void, as being inconsistent with the interest given; and secondly, that although a life interest may be expressed to be given, it may be well determined by an apt limitation." It is a reasonable qualification of this doctrine, that a grant to a woman may be subject to a provision which leaving her hands free while she is sole, will take effect in the event of coverture.

It results from the same principle, that while the settlement may be so worded as to limit the trust to a particular coverture, such an inference will not be drawn, unless it results clearly from the terms employed. A limitation, intended to exclude a particular individual, who is named or designated, will not apply to a subsequent cover-

ture, but "subject to this exception, a gift to the separate use of a woman without power of anticipation, will operate on all the covertures of a woman, unless the provisions are destroyed while she is discovert." *In re Gaffee*, 1 Mac. & G. 547; *Hawkes v. Hubback*, 11 Law Rep. Eq. 5. Accordingly, where by the terms of a marriage settlement, executed in view of a marriage then in contemplation, the income was to be paid to the said Lydia Marealy for her separate use, independently of the debts, or control of her said intended husband, so that she should not have power to deprive herself thereof by anticipation, Lord Romilly held, that the words "her intended husband" did not control the words, "limiting the income to her separate use during life;" *Hawkins v. Hubback*.

This course of decision is obviously more consonant with the watchful care for the rights of married women, which has so long characterized the court of chancery, than that pursued in *Hammersley v. Smith*, which is the less tenable because the English doctrine, cited by Chief Justice Gibson, that creditors and purchasers stand in the shoes of the debtor, and are entitled to every right that could be enforced by him, had been circumscribed in *Fisher v. Taylor*, and has since been virtually overruled in Pennsylvania. A trust may accordingly be created in that State, and in some other parts of the Union, for the descendants of the grantor, and as it would seem for any one

whom he may choose to make the recipient of his bounty, free from liability for debts, and without the power of alienation; *Fisher v. Taylor*, 2 Rawle, 33; *Holdship v. Patterson*, 7 Watts, 547; *Ashurst v. Given*, 5 W. & S. 323; *Vaux v. Parke*, 7 Id. 19; *Norris v. Johnson*, 5 Barr, 289; *Eyrick v. Hetrick*, 1 Harris, 488, 491; *Pope v. Elliott*, 8 B. Monroe, 56; *Braman v. Stiles*, 2 Pick. 463; and the power to create such a trust, obviously implies that of raising a separate use for a daughter in the event of marriage, and precluding her from alienating or defeating it while sole. The greater includes the less, and the claims of a husband on the property of his wife can hardly be said to rank with those of creditors and purchasers.

It has been determined in Alabama and Virginia, that a grant or devise, in trust, for the support of a married woman and her family, is not subject to the debts of the father or husband, even when he is entitled to share in the

benefit, or expressly designated as one of the *cestui que trusts*; *Markham v. Watkins*, 4 Leigh, 279; *Perkin's Est. v. Dickerson*, 3 Grattan, 335; *Wickels v. Miller*, 10 Id. 336; *Hill v. M'Rea*, 37 Ala. 175; and if such a trust is valid after the termination of the coverture, it may obviously be so framed as to give rise to a separate use for a woman, in the event of marriage, and preclude her from defeating it while sole; *Nickels v. Miller*.

In *Markham v. Guerrant*, 4 Leigh, 279, a husband conveyed property in trust for his support and that of his wife and children. The husband contracted debts without the assent of the trustee, and his creditors sought to subject the trust property to the payment of their demands; but the court held, that as he might have settled the estate on his wife and children, free from any obligation that might subsequently be contracted by him, the mere circumstance that he was included in the trust, did not render it invalid.

*EARL OF CHESTERFIELD v. SIR ABRAHAM JANSSEN. [*541]

FEBRUARY 4, 1750—1.

REPORTED 2 VES. 125.

POST OBIT SECURITIES—CATCHING BARGAINS WITH HEIRS,¹
 EXPECTANTS AND REVERSIONERS—CONFIRMATION.]—*A., aged thirty, borrows 5000*l.* from B., upon the security of a bond in the penalty of 20,000*l.* conditioned for payment of 10,000*l.* if A. survived C., his grandmother, from whom he had great expectations, but not otherwise. A. survived C. a year and eight months, and soon after her death executed a new bond in the penalty of 20,000*l.* conditioned for payment of 10,000*l.* to B., which he gave to B. on his delivering up to him the former bond to be cancelled.*

A bill being filed by the executors of A. to be relieved against the latter bond, as given upon a usurious contract, and an unconscionable bargain, the Court was of opinion that the contract was not usurious, and, without giving any opinion whether the transaction was such as the Court ought to relieve against, as an unconscionable bargain with a person dealing with his expectancy, held, that the acts of A., after the decease of his grandmother, amounted to a confirmation of the original transaction, and gave relief only against the penalty of the last bond.

THE state of the case upon the pleadings and proofs, as far as was material for the consideration of the Court, was shortly this. John Spencer, in 1738, being possessed of an income of 7,000*l.* per annum, and of a personal estate in plate, jewels, and furniture, to a great value, and having contracted a debt to the amount of 20,000*l.* to *several persons, mostly tradesmen, [*542] by whom he was pressed, and which he was desirous to pay off, proposed to borrow money, and particularly a sum of 5000*l.* for that purpose.

As he had a well-grounded expectation of a great increase of fortune on the death of his grandmother, the Duchess of Marlborough, if he survived her, he resolved to contract thereon. He was above thirty, originally of a hale constitution, but impaired; and, although afterwards he lived more regularly, yet he was addicted to several habits prejudicial to his health, which he could not leave off. She was seventy-eight, of a good constitution for her age, and careful of her health.

He sent to market a proposal, which he supposed would easily meet with a purchaser, as it was natural to expect, in common course, that his grandmother should die first, though she was a

¹ S. C., 1 Atk. 801, 1 Wills. 286.

good old life, and he but a bad young one. This proposal was, that if any one would lend him 5000*l.* he would oblige himself to pay 10,000*l.* at or soon after the death of his grandmother, if he survived her, but to be totally lost if she survived him. This was rejected by several knowing persons as not sufficiently advantageous, as it was at first by the defendant, but afterwards accepted by him; and a bond of 20,000*l.*, conditioned to pay 10,000*l.*, was given on those terms.

[¹The duchess of Marlborough died the 18th of October, 1744, and in the month of December following, on the defendant's delivering to Mr. Spencer the bond above mentioned to be cancelled, he executed a new bond, whereby he became bound to the defendant in the penalty of 20,000*l.*, conditioned for payment to the defendant of 10,000*l.*, with lawful interest, on the 19th of April then next; and at the same time executed a warrant of attorney to empower a judgment to be recorded against him in the King's Bench, at the defendant's suit, for the said 20,000*l.* on the said bond. The defendant, by virtue of the said warrant of attorney, caused a judgment to be made out on the said bond against Mr. Spencer, at the defendant's suit, for the said 20,000*l.*, to be recorded in *the King's Bench of Hilary Term next ensuing the date of the said bond.

In the month of December, 1745, the defendant, by the invitation of Mr. Spencer, being with him at his house at Windsor, he, on the 14th of that month, gave the defendant a bill for 1000*l.* on Hoare and Company, in part of the defendant's debt, and on the 21st of March following sent the defendant 1000*l.* more by his steward.

On the 19th of June, 1746, Mr. Spencer died, but before his death made his will, and after payment of his debts and legacies, gave all the residue of his personal estate to be at his son's disposal, the present Mr. Spencer, provided he left no younger child, and appointed the plaintiffs to be guardians of his son, and also executors in trust for him during his minority.

The executors of Mr. Spencer, finding his specialty debts were very considerable, and that such as were upon simple contracts only, which likewise amounted to a very large sum, would receive but little satisfaction through the deficiency of the testator's assets, after payment of such sums as were really and bona fide due on specialties, brought a bill to be relieved against the defendant's demand, as being an unconscionable one, charging that the condition stipulated by his security was absolute and independent of any other contingency than that of a grandson of thirty years of age surviving a grandmother of eighty; and as the period or point of time limited for the payment (which was in one month after the death of the duchess) could not, by reason of her great age and infirmities, be removed to any great distance, but was every day approaching, and in fact

¹ This statement between brackets, is taken from 1 Atk. 301.

happened soon after, so the requiring such a large sum as 10,000*l.* for the forbearance of 5000*l.* for so short a time, being at the proportion of 200*l.* for every 100*l.*, was a most usurious contract, and such as will never meet with the approbation or countenance of a Court of equity, especially where the demand is made upon the assets of an insolvent person, to the prejudice and defeating of his other just and honest creditors, and of an infant heir and residuary *legatee; and that the executing a new bond to the defendant, after the death of the duchess of Marl- [*544] borough, is only a continuance of the former transactions, and partook of the original fraud; and that, being an unrighteous and usurious bargain in the beginning, nothing which was done afterwards could help it; but on the contrary, defendant, on acquiring such new security and judgment, and thereby seeking to conceal the true transaction, did, as far as in him lay, add to the first fraud, and ought to be restrained from taking out execution on his judgment till the Court have first inquired into and determined upon the fraud; and therefore, it is prayed that the defendant may be adjudged by the Court to be a creditor of Mr. Spencer, only for such sums as he shall appear to have bonâ fide advanced, with interest from the time of advancing the same, after deducting what he hath received; and that he may be decreed to come in, and receive a satisfaction for the residue of such principal sums only, and interest *pari passu*, with Mr. Spencer's other creditors, according to the nature of his demand; and for an injunction to stay his proceedings at law till the hearing of the cause. July the 21st, 1747, the injunction was continued upon the merits till the hearing.]

Mr. Noel, Mr. Clarke, Mr. Wilbraham, and Mr. Crowle, for the plaintiffs.

This case is of great importance to the estate of Mr. Spencer, but of greater to the public. The bill is to be relieved against an exorbitant, unconscientious demand, on the known terms in a Court of equity, payment of principal really advanced, and legal interest. There are three general points to be determined. First, how that contract would have stood, if properly brought in judgment in a Court of law, and considered merely upon legal principles? Next, what the fate of it ought to be, in a much stronger degree, in a Court of equity, when examined by principles of equity? Lastly, the subsequent transactions relied upon in the answer as a ratification of the original bargain.

*As to the first, it is not good in point of law, and therefore usurious. Oppression of this kind is almost of [*545] as ancient date as the use of money as a medium of trade, and usury of a much more innocent nature was against the principles not only of the canon law, but of the common law of the land. Lord Coke says, in 3 Inst. 151, that a man being found guilty of usury after his death, all his goods were forfeited to the crown; although it is now altered by several statutes, which confine it to

such a quantum, allowing a certain moderate profit for the use of money: the difference, therefore, between usury and interest is, in specie, nothing, but in gradu. Though the severity of the common law is changed, the nature of things cannot be changed. It was the constitution of this country, and is so, that no gain should be exorbitant on the loan of money; and therefore it is immaterial whether it falls within the statutes or no, but this case does. Where such a contract is originally for the loan of money, and exceeding the legal allowance, it is rescinded by the Act of Parliament itself, though attended in some measure with a chance, being construed a subterfuge and evasion of the act; for, if it may be extended to one life, it is difficult to tell where to stop. The legislature took a different method formerly; in the first acts describing minutely what species should be allowed, confining it to a direct loan of money for illegal gain, or sale of goods or merchandise to persons in necessity; the specifying whereof introduced endeavours to evade the particular kind of usury described. Therefore, the 21 Jac. c. 17, is in general terms; in consequence of which, courts of law were vested with a kind of equitable jurisdiction, to consider the circumstances of the case, stated as particularly as in bills in this Court. The intent of the parties at the original communication is considered even by the courts of law as decisive; and where that is for a loan of money, or colourable sale of goods, whatever is thrown in of a different kind, it is usurious, otherwise not: *Reynolds v. Clayton*, Mo. 397, and *Becher's Case* there cited. Next, wherever security is taken for a larger sum than is *really advanced, [*546] it is usurious; unless the party may deliver himself therefrom by paying a less, or by doing some collateral act. The throwing something hazardous into the bargain, by which (as it is insisted) the lender might, in some event, have lost the whole, will not take it out of the statutes, and seems to have arisen from the statute 11 H. 7, c. 8, telling how far one might go to keep out of the acts: Mo. 397, and *Button v. Downham*, Cro. Eliz. 642; *Burton's Case*, 5 Co. 69; *Roberts v. Trenayne*, Cro. Jac. 507; *Cottrel v. Harrington*, Brownlow, 180; *Fuller's Case*, 4 Leon. 208, Noy. 151, 2 And. 15: and *Mason v. Adby*, Carth. 67, 3 Salk. 390, Comberb. 125. The only exception is the *fœnus nauticum*, or bottomry bonds; which, for the sake of the public and benefit of trade, are held not within the statutes of usury. The only view of the parties here was a loan of money, and security for double the sum advanced, subject to the contingency; the borrower could not deliver himself from the payment; and the Court will then lay everything else out of the case. In the calculation of lives, it is difficult to say where the true rule is: Halley and Newton have varied; but, on the first sight, one would think the lender had here greatly the advantage, from the disproportion; so that, on the face of it, it would be deemed a subterfuge in a court of law. Suppose the bond existing, and an action brought by the defendant, after the grandmother's death, and the statute

of usury pleaded; the parties may advance matters de hors; and it would be determined to be within the statute, which is very extensive, and, though penal, to have a liberal construction. The terms on which men communicate to borrow and lend, cannot alter the nature of the case. The quantum of the risk is not material, nor did the transaction proceed on the comparison of lives, or health, or constitution: but if it did, the defendant was satisfied of the contrary to what he now endeavours to support by proof, as to the constitution of Mr. Spencer.

As to the second point: Courts of equity, not being tied up to rules, consider questions of this kind in a more extensive manner, and in general have avoided laying *down any particular rule, as that would (like old statutes of usury) teach persons how far they might safely go; but declare, that wherever there is a spark of oppression—the motive on one side, necessity to apply for money, on the other, a covetous passion for undue lucre—they always relieve; not, indeed, setting it aside, but by giving what is really due. Their principles have been established gradually, and with deliberation; and, if one or two judges, who presided here, have differed and been unwilling, they have at last been compelled by the force of precedents and the growing evil. There were many cases for relieving against unreasonable bargains in case of young heirs in the time of Lord Ellesmere, Bacon, and Coventry. The first case afterwards is *Waller v. Dalt*, 1 Ch. Ca. 276; which was introductive of *Barney v. Beuk*, 2 Ch. Ca. 136. In *Berny v. Pitt*, 2 Vern. 14, Lord Jefferies held, there was no difference, whether it was for money or wares; that the first thing prohibited by the statute is for the loan of money, and that of wares put secondarily only; and reversed Lord Nottingham's decree, who had not been long in this court when he took that distinction. In *Birney v. Tison*, 2 Vent. 359, Lord North affirmed the decree, though he showed an unwillingness, by adding ne trahatur in exemplum. In *Batty v. Lloyd*, 1 Vern. 141, Lord North dismissed the bill. In *Nott v. Hill*, 1 Vern. 167, he would not relieve, and reversed Lord Nottingham's decree; but, on a bill for specific performance of the same agreement, 1 Vern. 271, he seems a little to remit that rigour he had at first, and would not countenance the practice. But *Lord Ardglass v. Muschamp*,¹ where there was both a risk and confirmation, shows he had entirely got the better of it, from the force of precedents. Other cases were before Lord Jefferies and Lords Commissioners, 1 Vern. 467, 2 Vern. 77, 78, 121, 402. So *Twistleton v. Griffith*, 1 P. Wms. 310. In *Curwyn v. Milner*, 3 P. Wms. 293, n., Lord King, though he seems, like Lord North, to have brought legal notions into this court at first, yet relieved. In *Lawley v. Hooper*, 19th November, 1745,² an annuity *of 200*l.* was charged [*548] on the estate of an elder brother, as a provision for the life of a younger, who, when in distress, granted 150*l.*, part

¹ 1 Vern. 287.

² 3 Atk. 278.

1
w
will
1 of
and
the
on;
n a
ght
tute

thereof, to Davenant for 1050*l.* seven years' purchase, with a proviso, that the vendor might repurchase on notice; but there was indorsed, that it should be on paying 75*l.* more than originally advanced: your Lordship held it a mortgage and redeemable; and that the 75*l.* more, when the thing was the worse for the wear, made it unfair. The principle on which the Court has gone in these cases is an unconscionable bargain; and, it being contrary to public convenience to encourage it, such contracts are generally founded in oppression, by taking advantage of the borrower's necessity, which is the general ground of the malignancy of usury; they are of public mischief, by encouraging extravagance of young men. If stopping the progress of it, as a growing evil, be thought for the public good, and no real inconvenience in laying an embargo on this sort of trade, this is *modus dignus vindice*. These contracts are generally by persons having an expectation only. Men thereby pledge their estates before they have them, consequently before they know the value. It is too true, that men generally have not so much regard to creating reversionary inconveniences, when they consult present gratifications;—know not how to estimate what they never felt the benefit of, by which their estates, like their pleasures, are gone before they enjoy them; and several poor creditors commonly fall with one of those prodigals. There is no remedy immediately, by our law, against this extravagance, as by the Roman law by *curatores*, interdicting a man not of understanding sufficient to manage his own property, from the use thereof. This extravagance has established a trade of annuities and post obits, universally exclaimed against. The ruin of a man who falls into this method, is declared not to be far off; he ruins his estate without spending half; for a borrower on post obits never puts it out to interest, and many of these are purchased at above half. Our sons may at this moment be doing the same, and all we have [*549] laboured for may be gone just after our *death. It is on the principle of public utility that Courts of equity have gone further than the law. So, from the general inconvenience, *præmiums* for places are not allowed, because there the office falls to the man; not that he is fit for it, but the office fit for him. So in marriage brocade bonds, the first of which was *Hall v. Potter*,¹ it is not for the sake of the party seeking relief; or bonds to have so much a year out of a particular office; or by clients to agents pending suit, although the party to whom it is given appears meritorious; or by a young man just after twenty-one to his guardian. In *Shepley v. Woothouse*,² 17th March, 1742, a bond by a man and woman to intermarry in thirteen months after her father's death, and for a reasonable settlement—the woman above thirty, and living in her father's house—the Court went on public inconvenience, as tending to deceive and encourage disobedience to parents. The cases are not confined to young

¹ Show. P. C. 76, 1 Eq. Ca. Ab. 89.

² 2 Atk. 535.

heirs; young remainder-men are as much the object; and the opinion of Lord Talbot was, that the relief of this Court should be extended to meet such contracts; they are grown into a sort of stated traffic, which tempts young men farther than their vices. Lord King indeed said, if this was *res nova* he might have had some difficulty; and it may not be easy to draw the line. If a young heir wanted to portion a daughter, or a sum to put into trade, buy books, or for such occasions, equity might not interpose: but where it is to feed extravagance, the Court will stop there. The same set of men are generally employed in such contracts; and a catalogue of some of their fortunes is nothing but pieces of ruin out of several families. No proof of fraud or undue advantage is requisite: the case speaks for it, and otherwise it would be saying, the Court will not relieve at all, as, to such secret transactions witnesses are not called in. It is unjust and unreasonable, and in that light a Court of equity calls it a fraud, arising from avarice on one side, and distress on the other; and will relieve on the same principles as in *Sir Thomas Meere's case*, 1 Vern. 465. So by Lord Talbot, in *Bonsanquet v. Dashwood*, *Ca. t. Tab. 40. That it was not sought by the defendant, will make no difference; the proposal generally [*550] coming from the person in distress. The defendant could not be ignorant of it, or of Mr. Spencer's expectation and dependency on his grandmother; his own witness, Richard Backwell, saying that it was hawked about that Mr. Spencer wanted money on those terms; and the necessity of concealing it from her, made him a slave to the person with whom he treated. It is literally true, that he was neither young nor an heir; but he was not old enough to manage his affairs. Twistleton was thirty-four; yet was his conduct relieved against. It is not generally in the case of heirs, though called contracts with young heirs; for an heir cannot sell a reversion: though he may estop himself by fine, he cannot grant. Mr. Spencer was quasi hæres, expectant though not apparent: the Duchess in loco parentis; and his dependency on her, from her constant declarations, a parental dependency, and known so to be by the defendant, who on that expectation built this contract. The contract itself, as well as witnesses, prove his necessity. The bare applying to pay two for one has been held sufficient. "Poor" and "rich" are relative terms: and however large a man's estate, if he cannot pay a debt, he is literally necessitous; and otherwise he never would have granted on post obits, or risked his expectations on such terms. Comparing the ages, the defendant cannot be said to run any risk: and the defendant has not shown that the contract moved on a comparison of the health of each: nor is there any certainty in judging, on these cases, of lives.

As to the *third* point, all the other acts of Mr. Spencer were, when under the like circumstances, as originally, proceeding from

¹ See *Twistleton v. Griffith*, 1 P. Wms. 310.

his inability to do more. His acquiescence cannot be considered a ratification, but may be excused by his looking on it as a debt of honour and a sort of wager. The bond and judgment is an evidence he could not pay; he would go as far as possible; no money could be raised but by annual rents, whereas an immediate [*551] *payment was to be made: and the borrower is a servant to the lender. Like *Curwyn v. Milner* (19th June. 1781), 8 P. Wms. 293, n., and *Wiseman v. Beake*, 2 Vern. 121, and *Lord Ardglass v. Euschamp*, 1 Vern. 237, where stronger instances of confirmation did not avail. So, in some of the prize causes in the Exchequer, some repeated confirmations were held rather an aggravation. *Cole v. Gibbons*, 3 P. Wms. 290, differs materially from this; for there a person, under no distress, renounced a relief he might have had.

Although the contract is usurious in law, the proper way is to come into equity to stop this species of traffic, which is of public inconvenience; no act of Parliament could be made to meet this evil, nor any rule that would not be inconvenient in particular cases. The policy of law and equity in this kingdom does nothing more than what has been done in other ages and nations, as appears from the Macedonian decree; Digest, lib. 14, tit. 6, "Law," 1, &c., where, though the words are *filius familias*, it shall not be confined to that. There ought, therefore, to be relief, on payment of the real principal and interest.

Mr. *Attorney General* (Sir Dudley Rider), and Mr. *Solicitor-General* (Mr. Murray), for the defendant.—This is indeed a matter of importance, being a question whether a man's own act, without fraud, in full senses, and having the absolute disposal, shall bind him. If (as has been argued) there was no other way in which the Court could assist the preservation of families from ruin, it is better the law should be wrong in itself, than uncertain. So far as a Court of equity can prevent such destruction by general rules, it will lay down such rules, but will not endeavour to preserve a weak or wicked man; nor say, that by the rules of equity an honest and wise man cannot be protected in his honesty and wisdom.

The question of law must arise out of the fact; the particular question of equity must depend on the fact also, considered under all its extensive circumstances, taking in the convenience and inconvenience, but still the ground to go upon must be made out [*552] by evidence. *It will hereby be shown that this is a fair, honest, and honourable contract.

The circumstances come under these heads—first, the character, situation, and figure of life of the obligor; secondly, the same as to the obligee; thirdly, the motive or reasonableness thereof, inducing the obligor to solicit such a bargain; fourthly, the manner of transacting and concluding; fifthly, the fairness and equity of the price, from the chance, under all the circumstances, according to the probability at the time and the event, that has happened; sixthly, the opinion the obligor always had of this.

As to the *first*, it is material in all cases. His understanding is not charged by the bill to be weak, or likely to be imposed on, or that he was imposed on. He was turned of thirty: no heir of any sort, in which the term is applied in these subjects; for if one, living with his father, is considered as heir (although *nemo est hæres viventis*), he had no father, but was himself father of a family: he was in no state of quarrel with any relations; known never to have gamed, which, it is proved, he hated; and he had taken up some former extravagances, and lived more temperately; was his own master; possessed of a fine family seat, with furniture suitable to his rank and figure; 7500*l.* per annum for life, beside present personal estate, contingent reversions, and hopes from his grandmother. The pressure on him for his debts of 20,000*l.* (it appears not how contracted) was from tradesmen. Justice obliged him to pay them; it would be scandalous not to do so, and prudence required it, lest it might alter his grandmother's opinion of him. He must have paid this by the annual profits, joint or single annuities for his life, or selling his personal estate, reversion, or the chance he had from his grandmother; and this would have been, probably, the opinion of the best and wisest friend he had. None would advise the selling his personal estate, family pictures, &c., which would be declaring himself bankrupt. The annual profits would not do it, nor would his creditors wait without impatience *for it. As to annuities (the way taken by a tenant for [*553] life who wants money for particular purposes), it certainly is not a beneficial way of contracting. It has appeared frequently, that if a man sells an annuity for his own life, so that he wants to sell it, the price is about seven years' purchase, supposing him of middle age and in good health; if he was to buy an annuity for his own life, the same man gives fourteen or fifteen, and in 1743 they went so far as to give sixteen or seventeen, which is a great difference. If there is any objection to the life, they make him abate in proportion. Taking it in the common way, he would get but 7000*l.* for 1000*l.* per annum; taking in the objections to his life, perhaps not 5000*l.* If he was to sell his reversion in fee, or the reversion of 10,000*l.* (the interest of which he had for life), if he had no younger children, he could have sold them for little advantage; nor could he have got anything for his chance under Lord Sunderland's will. Then his only chance to raise money was this, and it was the most reasonable way, if fairly done and on reasonable terms; and otherwise his goods might be taken in execution and sold for little value, as generally happens.

Next for the circumstances of the defendant, who is not charged in respect of his character, behaviour, or manner of dealing; as, in securities to women, their character must be charged and proved. It would have been material also that he had been acquainted with Mr. Spencer (the contrary of which is proved, as far as a negative can), or a companion in creating the debt and

encouraging it. All circumstances, weighing in other cases, are clear of this. The defendant is not a person looking out for young men to prey upon; he did not think it a beneficial contract, and absolutely refused it; but afterwards accepted it, on particular application and pressing. Mr. Spencer himself, in private, fixed on what he thought the fair price, and does personally, and by agents, propose these terms to any who would buy; which were refused by several, only because not advantageous.

[*554] *The motive has been observed on already.

As to the manner, it is proposed, in the first moment, as a conditional bargain. If it turned out against the defendant, there was certainty of a loss; if for him, they might live so long as that there would be a very improbable chance of gain. No undue advantage is taken, for what is proposed is simply accepted.

As to the equality of it as a bargain of chance, whoever deals in or buys lives must have regard particularly to the constitution of the person, manner of life, and age. If the life is bad, the company will not insure at all: all circumstances must be considered, and it is enough to go on probable opinion. The bargain supposes an inequality in their lives, that the grandmother was most likely to die first: she was of good health, and took care of it; Mr. Spencer the contrary, from his course of life. The insurance offices always go on opinion, and inquire into a general account; so that, if a false account is given in, actions are frequent in Guildhall for the fraud. It is proved, that, notwithstanding advice, he would not alter his course, and said he did not desire to live longer than his constitution would let him. In all these chances, if a man has gone through such shocks to his constitution as he did, they deduct two years' purchase. It was the opinion at that time that he was a bad life; and it appears negatively that it could not be insured at 5*l.* per cent. Taking it on the event, she lived six years after; he survived her but twenty months. Supposing his life was insured at 5*l.* per cent., which is the insurance in case of a person in the best health, on a computation of the value of lives and terms for years, the defendant is gainer about 3000*l.*, and might have absolutely lost it, if she had lived many months longer. Interest of the interest, which would then be lost, must be made in all computations. It is so as to the burdens to be borne between tenant for life and reversioner, which is rather too favourable to the tenant for life. The defendant has proved, that none would give that, or so much as he did: the plaintiffs have proved nothing of that, which

[*555] would have been *material to show the value of the contract. The disproportion, then, of the risk will not make it a bad contract; nor does this Court consider bargains in the nice scale of exact equality; nor adopt the rule of the Roman law, by which, if a bargain was one-half under value, it was set aside.

Lastly, his subsequent acts—as paying part, writing the letter himself to confess judgment, and taking every step after her death to carry it into execution—would not, perhaps, be of much weight if they were not consistent with his private opinion: his declarations in private being that he was honourably and fairly dealt by. The judgment was freely given, and not complained of afterwards; so that, if it could have been set aside originally, it cannot now; and, being in his senses, he might have released any demand. A release in terms of all his right to set it aside would have operated in point of law. Then is it not so in equity? A release, indeed, may, like any other contract, be set aside in this Court; but that must be on new imposition in obtaining the judgment. Things did not remain in the same situation, for now the money became absolutely due; nor was he under the same necessity; and might have disputed it then. In *Cole v. Gibbons*, 3 P. Wms. 290, the contract had not a possibility of being fair; yet there was no relief, because it was confirmed with open eyes. In *Standard v. Metcalf*, (November, 1784), the plaintiff lived with the defendant, her uncle, and soon after coming of age was prevailed on by him to settle her estate upon herself for life, remainder to her issue in tail, remainder to her uncle and his heirs; she afterwards became a lunatic. The transaction was thought on the face of it to be hard, and an imposition by the uncle, acting as guardian, there being no consideration, nor any occasion for it, not being for marriage; on a bill to set it aside, the defendant insisted it was fair, and that, after the settlement, she by will, to which he was not privy, had given the estate in the same way. Lord Talbot thought it an extraordinary contract, and unfair, though no proof of fraud, and said, if it depended on the settlement *only*, he should have relieved; but the [*556] will had confirmed it, which took off that ground to set it aside; on appeal it was affirmed, with this variation only, that as the bill was by the committee it ought not to bind the lunatic, but should be without prejudice to her, if she should become sane, and seek to set it aside. The will did not operate there, but only showed a confirmation. So, but in a stronger degree, does the subsequent act here.

As to the use, in fact, to which this money was applied, it is not material to the defendant to show that, having advanced it *bonâ fide*; but what materially distinguishes this from other cases is, that it was applied to the payment of the borrower's tradesmen.

To consider *next* the question of law—whether this contract, as it stood originally upon the bond, is void at law. If so, it is indeed putting it on a clear foundation. Mankind will have a rule for their property, and know the construction of the statute; and it will be needless to argue as to the consequences in this Court; for one cannot, with his eyes open, make an agreement contrary to that statute. As a bargain for a contingency, there is no objection; for all sorts of contingencies are the subjects of a

legal contract. Any objection, then, to this, must be on the Statute of Usury, which is not frequent in a Court of Equity. No contract is a contract on usury within the statutes which was not so before them. By the common, taken from the canon, law, a notion long prevailed, that it was not lawful to take any interest for the use of money, which prevails in Roman Catholic countries to this day; and it is astonishing how they should think money might not be a commodity to be used as well as any other. This notion kept that commerce out of the world. In France, they let out money to interest in another shape. Lord Coke, in 8 Inst., labours hard to show, that taking any interest is contrary to nature, and endeavours to prove it also contrary to the law of Moses; but the age is grown wiser, and the law is altered. Any sort of premium was usury; now, an illegal premium only. Premium is a word more extensive than interest; and usury is [*557] taking *a higher premium than the law allows for the use of money. The statute Hen. 8 is an act against usury, fixing the rate of it; which has been followed by the legislature until 12 Anne, and the rate of interest varied; and the sense of all the statutes may be taken together. Perhaps it may be a doubt, whether it is for the public good to have any law fixing the rate of interest, or that it should be like other commodities at market. Locke's treatise upon the consideration of reduction will, at least, make that doubtful. But it must be taken on the statutes, which comprehend only contracts on usury. There must be a principal sum due, and a rate of hire for the use; if it exceeds the proportion fixed, the security is void, and no artificial contrivance shall evade that law: therefore, on pleading the Statute of Usury, it may be proved by any collateral evidence, where it appears not on the face of the contract. Where there is no principal and rate of forbearance, the statute relates not to it. At common law, therefore, when usury in general was forbidden, a contract on condition or peradventure was not within it. Hawkins, C. 82, never disputed as to this point; where the principal may be hazarded really, it cannot be usury. Contracts on bottomry are not excepted out of the statute, yet are clearly not within it from the nature of the contract, the contingency of the ship's returning. So, the discounting notes or bills of exchange is not within the statute, no principal being due which is foreborne; so, the buying up of securities at a low rate on the estate of a third person, of which more than legal interest may be made, is not within the statute; so, a wager at odds, which is, *Bulton v. Downham*:¹ so, of casual bargain, *Bedingfield v. Ashley*;² so *Fountayne v. Grimes*,³ and *Long v. Wharton*.⁴ Insurance, interest or no interest, is barely a wager, and not within it, according to Doddridge, J., in *Roberts v. Trenayne*,⁵ and *Sharpley v. Hurrel*.⁶ Yet none of these cases but may be turned into such

¹ Cro. Eliz. 648.⁴ 8 Keb. 804.² Cro. Eliz. 741.⁵ Cro. Jac. 507.³ Cr. Jac. 253.⁶ Cro. Jac. 208.

a shift as may be brought within the statute, if that is the truth of the agreement; as in bottomry, if it be a mere evasion and no risk. Where the principal is secured, no contrivance *can exceed the rate of interest, which, being forbid absolutely, [*558] is forbid on contingency. The cases cited for plaintiffs prove only, that, where it is but a nominal risk, it is a mere shift and evasion; as in *Clayton's f.c.*,¹ where the demurrer admitted the corrupt agreement, and there was no objection to the pleading. A stress is endeavoured to be laid on words in determining a question of property, from the word "loan," &c., made use of in this case. If it is a loan within the Statute of Usury, it is material; but a contract on usury is not a loan in its nature, a loan being that which is gratuitous. It is true, there is a difference between a loan not consumed by using, and a loan which is consumed. The first, as of a horse, is called "commodatum;" for lending is not understood to be letting it, if not consumed: the other is to be repaid in weight and measure, and is called "mutuum;" but in its original was gratuitous. But the Court always goes to the substance. What is a loan in its nature cannot be made a purchase by calling it so, nor e contra. This never was proposed in the nature of usury, the original communication being for this contingent bargain: no principal was due, nor rate for forbearance; which they cannot be from the nature of the contract. In bottomry it is called a loan, but not therefore usurious; and there is no difference between this and bottomry, which is admitted to be a hazardous contract, and good; not because it is for the benefit of trade, but that a material risk is run, and to be paid for. So that it turns on this, whether it is a fictitious, colourable contingency to evade the statute; for if it is so it is void, otherwise not. If no bargain can be made of a contingency on a life but what is within the Statute of Usury, it will be a proposition understood by every one. Suppose an action brought, and a plea put in; this could not be considered as a nominal contingency, and to evade the statute.

Next, whether this Court can set aside this legal contract upon arguments of conscience arising out of the case, and that in the utmost latitude. The proper jurisdiction *of equity is, [*559] indeed, to take every one's act according to conscience, and not suffer undue advantage to be taken of the strict forms of positive rules. As this is only a ground of equity, it may indeed be made out by any sort of evidence upon all the circumstances; and on all together the Court cannot say the defendant is guilty of misbehaviour (which is not charged or suggested), or say this ought not to stand. Here is no fraud or overreaching—no evidence from whence imposition is to be presumed; and the amount of the cases cited for the plaintiffs is, that the Court will relieve against fraud in this as in other cases.

But supposing these points against the plaintiffs, another and

a very general question has been made of the first impression—viz. supposing the transaction good in law and conscience, yet this Court should, for the sake of making a rule, set it aside on principles of policy or political reasoning; for, on fraud, there can be no case in which this Court will not relieve. No political principle can be stated on which it should be set aside; therefore, such a ground of determination is impossible in this Court. There may be a difficulty to tell what sort of rule. It is admitted that no certain one can be drawn, because it would be dangerous when applied to particular cases; and it is, therefore, said, acts of Parliament cannot be made to meet cases of this kind. This Court does not exercise or assume a legislative power, but disclaims it, and never will make a law to set aside contracts on public principles out of that cause, if good in law and conscience, let the convenience or inconvenience be what it will. The contracts in Exchange alley were all contingencies; yet it was necessary to have an act to set them aside, although easily proved inconvenient to the public. So, of fair and equal wagers, an act of Parliament, 7 Anne, was forced to interpose. So of gaming—money won at fair hazard, *wi hout* cheating; this Court never set it aside before the legislature interposed: so that political arguments are never taken into consideration. The contract of [*560] sailors, selling their shares before they knew *what they were, could not be set aside here.¹ It is true, there cannot be a more wretched condition than to have the rule of property uncertain, *misera servitus ubi jus vagum*. Lord Digby says, “Set the mark on the door of the house, and let me know that it is wrong, or it is doing it *ex post facto*.” Where the Court has gone upon public convenience, it has been in cases defined and ascertained, which it is admitted, this cannot be. It is a misfortune that accounts of Courts of equity are conveyed to the public in loose notes by persons not concerned in the cause, and mistaken, and that general rules are drawn from particular premises. The Court, in all the cases alluded to, has inferred a presumption; but in all, the presumption may be taken off; it depends on the evidence. If a trustee buys the estate himself, the evidence from his situation is sufficient; he has misbehaved, for he cannot be a check on himself, and does not act fairly; but the presumption may be taken off, as if he agrees openly and fairly with *cestui que trust*, or with the knowledge of this Court.² So, in bonds to lewd women, getting security for nothing: she has grossly misbehaved, and the common presumption is, that she has taken an advantage; but that may be taken off. So, in marriage-brochage bonds: the defendant there has lain such a bias upon himself, that he cannot properly advise; has a power and distress over the party; this is evidence, unless taken off. So, in a private

¹ But see *Rochford*, 1 Wils. 229; *Taylor v. Rochford*, 2 Ves. 281; *How v. Weldon*, 2 Ves. 516.

² See *Fox v. Mackreth*, and note, ante p. 115.

bargain, to give back part of the marriage portion, contrary to the public treaty, it is fraudulent, and a presumption arises of undue advantage, because the father may say he will not otherwise agree; but that may be taken off. Bargains for money, under which offices are procured from one who had the giving or recommending, have nothing to do with this; but there the presumption, from the misbehaviour, as the man cannot get the office without it, may be taken off, as where sold with the King's leave, as commissions in the army, or a sum of money may be paid out of the trust of an office, as in Mr. Bellamy's case. Another instance is, the setting aside securities to attorneys pending the business, which *was *Walmesley v. Booth*¹ (2d May, [*561] 1741), where Japhet Crook, being prosecuted for forgery, employed the defendant to be his attorney, who was to get bail, money, and probably even evidence for him, and just then procured him to enter into a bond for 1000*l.*, for which there was no consideration but for services done. This a Court of justice would never suffer, but has relieved on principles of a general nature, that an attorney should not take advantage of his client's distress to get from him what he ought not. This Court and a Court of law will, without showing errors, tax an attorney's bill, though settled by the party himself, unless a great acquiescence, or some such matter; it was an unreasonable bargain, and the presumption was from his not being at liberty; but it has never been determined as a rule, that a bonâ fide attorney may not receive a gratuity over and above, pending the matter. Another rule insisted on is this, that mutual bonds to marry shall be set aside by the Court, though ever so fair; yet in *Atkins v. Farr*² (February, 1738), your Lordship decreed relief on such a bond. That rule was taken from *Woodhouse v. Shepley*,³ but your Lordship there said, you gave no opinion what would be the case if the bond was entered into by two persons sui juris, without fathers, or emancipated, having fathers. The ground there was, not that the woman did not know of the bond, which she certainly did; she lived in her father's house, had nothing but from him; they met at night out of the house, and executed this bond: it was held a fraud and imposition on the father, who was made to believe the match was off: it was seducing her from his house, and encouraging her in disobedience: therefore, though she knew what she did, the Court relieved.

Lastly, as to the case of post obits, it is said, where sons, whether in remainder or otherwise, or filius familias, not having a fortune or emancipation of their own, are encouraged in riot and expense, the Court relieves, without evidence, from the particular purpose, because no son, in the life of his father, shall make such a bargain: but that is not the ground of relief, for that may be denied, *like all other presumptions; from the reason of the thing, it is the misbehaviour to persons [*562]

¹ 2 Atk. 27, Barnard C. Rep. 478.² 1 Atk. 287.³ 2 Atk. 535.

under this description to share in riot and encourage disobedience; which appears from Domat, under the general title "Loan;" and in another place he says, that, on a bargain with *filius familias*, under such circumstances there may be relief, under such not; not saying but that a son might, for a portion, even when *filius familias*, do it. As to which an observation arises on the case determined by Lord Nottingham, who relieved against many of these contracts on particular evidence. Lord North thought he went too far; Lord Jefferies, that he did not go far enough, which is not to be wondered at; for, judging upon circumstantial evidence, they might draw different conclusions. Lord Nottingham's reasons, in manuscript, shew he did not think he was going on the general rule, that a son could not sell a contingency. The case is entitled *Berny v. Pitt*, 2 Ch. Rep. 396. Berny was drawn into several securities for money, to be paid after his father's death, who then was infirm, and kept alive by art; by some he was to pay five for one, and thus was involved in debts to 50,000*l.*, or 60,000*l.*, in all which he appeared to be circumvented and beset; most of the money pretended to be borrowed, being raised by delivery of wares, at an excessive price, as wine, hemp, &c., which could not be sold for a quarter of the price; but the plaintiff, from his necessity (his creditors being underhand procured to fall upon him), was willing to get money on terms against which he sought relief. Lord Nottingham first made him pay the principal borrowed, before he would give an injunction, but relieved him as to the rest at the hearing, because, he said, this infamous dealing ought to be suppressed. That the Star Chamber used to punish, and this Court ought to do it; and that no family could be safe if this was suffered. But Pitt prevailed, and the bill against him was dismissed, though he gained about three for one; for it was in the time of his father's health, three years before his death, without any circumvention or practice, upon an [*563] express agreement to lose the principal if *the son died in his father's life; which shews the ground of the determination—relieving against those defendants guilty of misbehaviour, yet thinking that a proper bargain might be made by the heir. Lord Jefferies, on the evidence of that case, when before him, laid a different stress, and relieved against Pitt also. From that time there is no case, until *Twistleton v. Griffith*,¹ which turned on the particular fraud and circumvention. *Curwyn v. Milner*,² as cited, is a determination against Lord King's opinion, that he thought himself tied down by precedents; but, if it had been entire, he might have been of a different opinion; and, in the note in 3 P. Wms., it is misstated "and" instead of "or." It is going a great way to say, there can be no case where a son could sell a reversion, where the presumption is taken off. Presumption is evidence but until the contrary proved. This is not the case of a son; but of one, master of his own property. Cujus

¹ P. Wms. 310.² 3 P. Wms. 293, n.

dare, ejus disponere. The principle is too large, that this is to be set aside because of a want of money on one side, that holding in every bargain. Then, as to the prospect of gain on the other, it is a laudable motive, provided they act honestly. He was under no more necessity than any man may be presumed to be who sells his estate, and cannot therefore come into equity to set it aside, because he wanted money to pay debts, and would not otherwise have sold it. The ground of common recoveries is to enable people to discharge debts by sale of estates. If it is to be set aside as being an expectation from a grandmother, the Court must go into very minute circumstances. As to the Court's relieving upon general principles against annuities for the life of the seller, the Court never laid it down that such annuities simply were bad. *Lawley v. Hooper*,¹ was on particular grounds; the plaintiff was in gaol at the time, and fraud infecting the whole; but the Court did not say, no annuity shall be allowed that a man sells for his own life; if so, there is an end of all insurances on lives. The reasoning in *Batty v. L'oyd*, 1 Vern. 141, was never contradicted. There would be great difficulty was one not allowed to sell *such things, and turn into money, but must starve ob [*564] hæredis causam. Contracts for contingencies have been admitted; *Beckley v. Newland*, 2 P. Wms. 182; and in *Hobson v. Trevor*, 2 P. Wms. 191, a contract for sale of an expectancy was even carried into execution. In *Whitfield v. Fauisset*, 1 Ves. 387, 1750, a mere possibility was sold by the heir, nothing vesting in the life of the father and mother; and yet your Lordship decreed a further assurance by the heir; which, if an illegal contract, would not have been done. So, where an officer, going abroad, assigned his future pay,² a bill was brought to stop the money in his agent's hands; it was argued, such assignments were not to be endured, because uncertain and against the public service, and should be discouraged, as spending one's estate before he has it; yet the Court thought every one might dispose of his property, and decreed it because not unconscionable, though that was a contingency and possibility; equity going further than the law, which allows as contracts, but equity as conveyances. But what is this public good which is not to be defined? Is the end proposed by this, that none shall spend above his annual income? That is not to be secured in human nature, or prevented. Though the Romans had that law, they were allowed to spend their estates. Is property to be locked up to another generation?—for that effect it will have, which is contrary to the principles of the constitution of the legal part of the government; the later books, perhaps for 200 years, giving a reason why the Statute de Donis is not to be kept and preserved, that mankind may apply their property to pay their debts; and judges have said, there is great inconveni-

¹ 3 Atk. 278.

² See, however, *Stone v. Lidderdale*, 2 Anst. 533; *McCarthy v. Gould*, 1 Ball & B. 389; *Davis v. Duke of Marlborough*, 1 Swanst. 74; *Osborn v. Williams*, 18 Ves. 379.

ence in people not being able to sell their own estates. Is the end proposed, that a man may raise money on easier terms if this is set aside? The consequence would be directly contrary. If one wants money, and a difficulty is laid upon contracting with fair honest men, he will go into the hands of knaves, who will make him pay for running the risk of the law, and insist on more, when it is understood that he could not make a contingent bargain.

[*565] *This was not lent to feed riot, but to get rid of a pressure, which is a reasonable cause, and, therefore, no ground to set it aside on political motives. As the law cannot find out a general rule to proceed on, much less will this Court; and, in every case where equity cannot relieve, it is not fit to be relieved.

February 4th, 1750-1, the Court delivered their opinion. Absente, WILLES, C. J.

BURNETT, J.—Upon the state of this case three points are made.

First, that the original contract is usurious, contrary to the statutes, as being a greater *premium* than the law allowed; and, if so, the new security will fall to the ground, as well as the contract itself.

Next, that, if not usurious, it is so unreasonable an advantage taken of necessity and future expectancy, as the Court is warranted to relieve against as an unconscionable bargain.

Thirdly, that if the Court is warranted to relieve against this, the new security will be considered as a continuance of the same oppression, and stand in the same light, though entered into after the event.

The other side insist that the original contract is a mere contingent bargain, and consequently not within either the intent or words of any statute. There are no circumstances of a destitute heir or person seduced from parental government; no practice, fraud, or surprise; and that the bargain is equal, taking into consideration the risk run of the principal: and, therefore, the Court is not warranted to relieve, even on the footing of the original bargain. But supposing the Court would relieve on that, yet there is no precedent (but to the contrary) of relief when the party has taken on himself to be a judge of the equity of the contract, and confirms it with his eyes open.

The case is new, and I shall endeavour to throw my thoughts into one connected light, and occasionally take in all the cases cited.

[*566] *As to the *first* point, whether the loan of 5000*l.*, to be paid 10,000*l.* on the death of the duchess, if he survived her, but nothing if he died before her, is usurious, or a mere casual, contingent bargain. I hope I may be excused in calling it a loan; because, although, in a case where the capital is not in all events to be paid, the word may be improper in courts of law, this Court at least has adopted the use of that word in respect of a mere contingent bargain—that of bottomry. If this contract be usurious, it must be either because it is contrary to express

words of the statute, or an evasion out of it. It would be mispending the time of the Court to enter into the old notion about usury, and the condemnation of it by canonists, civilians, and some common lawyers, because all those expressions depend on a principle which is out of the present case. The common lawyers differ, there being great opinions either way. Lord Coke seems to call all usury unlawful: 2 Inst. 89; 3 Inst. 151;—but in Hard. 420, Lord Hale, says, the Jewish usury only is prohibited by the common law, and the true spirit of usury lies in taking an unjust and unreasonable advantage of their fellow-creatures. But it must be agreed, that nothing is legally usurious that is not prohibited by stat. 37 Hen. 8, c. 9, which leading statute is followed by the rest; the 12 Anne, c. 16, varying from it only in reducing the legal interest: the cases determined on the first statute have been, therefore, always looked on as authorities on any of the subsequent. Therefore, to make a contract usurious within the express words of the statute, the reward must be taken for forbearance, or giving a day of payment; and whatever shift is used it will be usury, but not within the statute where it is otherwise. If, in truth, it was a sum advanced by way of loan, and the reward, in truth, given for forbearance, no shift will prevail. I shall better explain myself by the instances I shall put. Supposing there is a purchase of an annuity at ever such an under price, if the bargain really was for an annuity, it cannot be usury; but if the communication was about borrowing and lending, it may be usury within the statute: and how? If, by reason of all the circumstances and of the communication, the exility of the sum given, the original contract being a borrowing and lending, the Court thinks the annuity was a mere device to pay the principal with usurious interest to evade the statute, this will be within the statute, though on the face of the bargain it appears ever so fair a sale of an annuity; the contrivance of the annuity, as the usurious reward of the loan of money, shall not evade the statute made for the benefit of mankind. This I take to be the sum and substance to be collected out of the several cases: Cro. Eliz. 27: 4 Leo. 208; Noy, 151; 1 Brow. 180; and 2 Lev. 7. So, a bargain on a mere contingency, where the reward is given for the risk, not for forbearance, will not be within the statute; but otherwise if the intent was to have a shift, which was Cro. Eliz. 642, 8. If, therefore, a man gives or lends money, not to be paid if the event should be one way, but double if the other, and it is uncertain which way it will happen, it is not within the statute, for the reward is given for the risk, not forbearance; but if, under colour of such an hazardous bargain, the real treaty is for a loan, with an usurious reward for that loan, and to evade the statute, the contingency inserted is of little moment, being no ingredient between the parties, the Court, or a jury, on the whole, may pronounce such a contract usurious, notwithstanding the colour of contingency, if they are satisfied the reward is given for forbearance, not for the

risk—as in the adding a single life, which is a healthy life, if that life should survive half a year: so they might as well add a contingency, if any one of six persons was alive at the end of six months; and one of the cases is, if any one of three persons is alive at that time. The intent of the bargain is the material thing: if that was borrowing the money, it is within the statute, whatever colourable contingency inserted; and this is the sense of all the resolutions in the several cases: 5 Co. 69, 70; 2 And. 15; Mo. 897; and *Mason v. Abdy*.¹ But where the principal was [*568] fairly and truly put in hazard, and such as none *would run for the interest the law allows, there is no case where it has been held within the statute. The slightness or reality of the risk seems to be the only rule directing the judgment of the Court: Cro. Eliz. 741, *Beddingfield v. Ashley*; and in 3 Keb. 304, *Long v. Wharton*, which, though inaccurately reported, seems to me good law. I cannot see two contracts bearing a greater similitude than this and bottomry. A life may be insured; so may a ship, which may sink the day after, so may the party die; one is as much an adventure as the other. It was endeavoured to distinguish bottomry from every contract upon this, that though above what the laws allows upon a loan, yet bottomry contracts were established in favour of trade, there being a risk of the principal, and they being necessary for trade and commerce. But, whatever favour the Court may show to such contracts, they will never establish them upon the destruction of a statute; and the principle of the Court thereon was, that the bottomry bond was not within the statute; nor could it be, for it is plain that a real risk was run, that the principal may never be payable; therefore, it cannot be given for forbearance, but grounded merely on the contingency, the risk. But as a colourable contingency, in case of a life annexed to the payment, may make that bond usurious, so will a colourable contingency annexed to a bottomry contract: as in a bond, if one out of twenty ships, bound from Newcastle to London, arrived safe, that would be a contingency thrown in to evade the statute, which would be too hard for such a bond; so, if such a contract is made, if the packet should return to Dover from Calais, at a season of the year in which there is no danger: and this I may say with the more security, as *Joy v. Kent*, Hard. 418, is an express proof of it, where a bottomry bond was sent to be tried, whether it was an evasion of the statute, which would not have been so if it could not have been an evasion. Indeed, Lord Hale throws out expressions very favourable to trade, but so inaccurate in that book that I do not think they could be such as came out of [*569] the mouth of so great a man. His *dictums, then, are of no authority. One of the first cases of bottomry which came in question was *Sharpley v. Hurrel*, Cro. Jac. 208. What the Court goes on there is the real risk of receiving less, which is

¹ Carth. 67.

cited again in *Roberts v. Trenayne*, 2 Roll. 47, and Cro. Jac. 508, which differed from the other. In *Soome v. Glen*, as in 1 Sid. 27, the resolution is founded on the real hazard of the principal, which cannot be within the statute. On the whole, therefore, I am of opinion, that this is not a contract founded in its origin upon usury, but a contingent bargain, and consequently, within the express words or intent of none of the statutes of usury.

The *next* point is, supposing it not a contract within the statute, whether it is not such an unconscionable bargain, obtained of an expectant upon his expectancy, as the Court is warranted on precedents to relieve, on paying the sum advanced, with interest from the time of advancing. If it was necessary to give an opinion upon this, I own I should have great difficulty. On one hand I should apprehend it would be too large to say, in no case an heir or expectant could borrow money on his expectancy; and yet to let him borrow without any advantage to the lender seems to put him under difficulties; fathers being frequently close handed, though liberal enough at their death: so that an heir, if hindered from supporting himself by these means, might starve in the desert, within view of the land of Canaan. On the other hand, I should dread the consequence of giving the sanction of this Court to future bargains. Lord Cowper states the inconveniences of a sanction which had been given. I am sure, it is a point of that consequence to the welfare of mankind, that without necessity no Court will give an opinion of which an ill use may be made. For the plaintiff it is insisted, that there have been many contracts not illegal or iniquitous in some circumstances, but, from the universal ill tendency on the prejudice to the public, have been always set aside in this Court: instances of which were in marriage-brochage bonds, and other contracts of like nature; and that the ill tendency of heirs *contracting with strangers to furnish their wants is to make them [*570] quit a regular family life and dependency, to withdraw from advice and counsel of friends, and to have youth supplied with the means of gratifying their passions, and the bringing people together on the worst principles on which men may contract—avarice on one side, and a craving appetite on the other. The greediness of gain is the only principle on which a stranger can be induced to furnish a stranger; and the occasion of applying to a stranger is, because the wants are such as he would not reveal to his family; which tends to a delusion in what is of general concern, the provision for posterity. A man may be giving his estate to a money-lender instead of the person intended; and every one disguising the truth from a man who has a right to the truth is wrong, and ought not to be encouraged; and by this delusion he gives his estate to strangers, when he thinks he is giving to his heir or relation, and when, if he had known the truth, he would have provided for that heir or relation, so as to prevent his beggaring himself. This has been a growing practice to supply young heirs, and the Court has extended its remedy.

At first the cases are, where there is express proof of gross practice or actual imposition; from thence it went to cases where, on the face of the contract, it was so gross and unreasonable a contract between the parties, that the Court, on presuming a man would not enter into it but by imposition, has relieved; of which one case among many is *Nott v. Hill*, 1 Vern. 167. As the mischief increased, the Court has extended its remedy. Where the bargain is so lucrative, and the person under necessity, so that the judgment of the Court has been, that necessity alone could induce to make that contract, there has been relief: the first case of which kind is *Berny v. Pitt*, 2 Ch. Rep. 396; 2 Vern. 14, a very remarkable case, and a stronger there could not be. It is also stated by Lord Cowper, in *Twistleton v. Griffith*, 1 P. Wms. 310, where were marks enough of imposition to warrant relieving on that foot; but he chose to establish it on the general principle [*571] and Lord Jefferies' decree, *not on the particular circumstances of the case; and he seems to rejoice in the consequence, that this would put a difficulty on an heir to borrow on his expectancy. The last case is *Curwyn v. Milner*, 3 P. Wms. 293, n., where Lord King decreed relief; but said, if it was new, he would not have gone so far, where such a contract was fair, and done with open eyes; saying, he thought himself bound by precedents, and that he saw no difference between an estate settled on an heir at his father's death, and an expectancy of personal estate at the death of a relation: it is the same kind of expectancy that tempts to these kind of bargains, and the influence the same.

On the other hand, it is insisted, none of the particular cases cited come within the circumstances of this: that all those of fraud, practice, or imposition are out of the case, it being a bargain sent to market by the borrower, and the terms his own; no destitute heir under parental government having a great personal estate, and so not in the circumstances of the party seeking relief in other cases; the bargain itself different; the risk being different, and the bargain, in all its circumstances, so equitable, that, if the Court should enter into a nice examination of the proportion and risk, it would appear the defendant would have been out of pocket if the grandmother had lived a little longer: that this Court will not lay down a principle in general, that an heir or expectant may not contract on his expectancy: that there have been instances where such contracts have been carried into execution, as *Hobson v. Trevor*,¹ and *Whitfield v. Fausset*:² that it is a sufficient terror to such contractors, that they are always liable to the examination of this Court: and that they can never stand but on the reasonableness and justice of the contract, which will restrain one kind of men from preying on the follies of another. These are the arguments on both sides, and there would be danger and difficulty in giving an opinion on either;

¹ 2 P. Wms. 191.

² 1 Ves. 387.

but there is no necessity for it, that being taken away by Mr. Spencer himself, who has made himself the judge, by voluntarily giving a new security.

*Which is the *third* point, supposing the Court would relieve against this in its original, whether it will, when [*572] altered by the party in the strongest manner, not unapprised, and with his eyes open. There is no case of a contract so confirmed which was not illegal (but such as the Court would have relieved against in its original instance), where the Court has relieved against the confirmation; unless obtained by fraud or oppression, and then it has been considered as a continuance of the first oppression; of which there are two cases in Vernon—*Lord Ardglass v. Muschamp*,¹ and *Wiseman v. Beake*,² but there is no resemblance to the present from either. There was no fraud, practice, or imposition in the original contract or subsequent security. The defendant was not very pressing for his money, the security not being given until a good while after; which shows no suit or distress was threatened, but fairly and voluntarily done, and upon intimation received that the defendant had a doubt whether he could make good the contract in a court of equity. *Cole v. Gibbons*, 3 P. Wms. 290, and the note of the case at the bottom of that, is applicable to the present.

As there is nothing, therefore, to set aside this contract on the foot of usury within the statutes, and next, supposing it was such as would be set aside if left to the consideration of the Court, yet as the party, with his eyes open, has bound himself to execute it, he ought to execute it. It is too much to set it aside; the penalty, therefore, is the only thing which can be relieved against in this case.

SIR JOHN STRANGE, M. R.—There is no occasion to introduce what I have to say with making a particular statement of the case; but as it depends on a variety of circumstances, many of which must be considered in the argument, I shall content myself with taking them up in the course of it.

The questions upon which I am to offer my advice are *three*.

**First*, whether the original advancement of the 5000*l*. in the manner as deposed by Mr. Backwell, and disclosed [*573] in the defendant's answer, and the bond taken upon it, are to be considered as usurious, and consequently void in point of law.

Secondly, whether, supposing the bond does not come within the Statutes of Usury, the transaction or bargain in 1738 is of such a nature as will entitle the plaintiffs to be relieved in equity on the circumstances attending that part of the case.

Thirdly, whether what appears to have been done by Mr. Spencer, after the death of the duchess, will in any and what manner influence the determination of this case.

As to the *first*, I concur in opinion, that this is not an illegal

¹ 1 Vern. 287.

² 2 Vern. 121.

agreement made void by the Statutes of Usury. The prohibition will stand on the words and meaning of 12 Anne, c. 16, for that does not materially differ from 21 Jac. 1, or 12 Car. 2, and appears calculated for such loans wherein two principal circumstances must concur—agreement to give and receive an allowance of profit in the mean time for the money hired, in a greater proportion than allowed by the statutes; neither of which circumstances occur in the present case. The repayment of the money advanced depended on a contingency, which, if it happened one way, the whole was totally lost; during the pendency of this, no interest or profit could accrue to the defendant, but a mere wager or bargain upon contingency which died first, so that the whole was at hazard. It is objected, that though the letter of the contract may be so, yet, if the design of the parties was to borrow the 5000*l.* and one should give a greater use for the money than the law allows, putting it into this shape will not evade the statute, in which statute are very general words, to take in all covin, shifts, &c., which I agree to; and, therefore, if the Court can satisfy itself that this was not in reality a bargain, whereon the principal was designed to be at hazard, and the shape in which it [*574] was put was only a contrivance to evade the *statute, it will be usury, and consequently void. Whether the agreement is usurious, or not, may be determined two ways: first, by verdict of a jury on a plea of the corrupt agreement; secondly, by the Courts exercising their own judgment on the circumstances of the case disclosed to them. The first of these methods could not be taken in this cause, because it appears the bond was cancelled upon giving the judgment after death of the grandmother, and therefore no action could be brought on it; and, if there had been a scire facias at law on the judgment, either against John Spencer or his executors, no plea of the corrupt agreement could be received; the judgment *redditum invitum* not being a contract or assurance, which are the words of the statute; and this was the opinion of B. R. in *Foot v. Jones*, Pasch. 9 Geo. 2; the other method has often been taken, as in *Roberts v. Trenayne*, Cro. Jac. 503. Thus, wherever the Court has seen that the contingency to put the principal in hazard is only added colourably, and only a nominal risk, the Court, to prevent an evasion of the statute, has determined it to be usury; as in *Clayton's case*, 5 Co. 1, and other cases, where the adding the contingency of a particular person being alive at the end of a year was only a shift. So, by Holt, Comb. 125, and Carth. 68. But a wager between two, to have forty for twenty, if one was alive at a future day, would not be usury: Cro. Eliz. 642, *Button v. Downham*: and in 1 Lut. 470, notice is taken of its appearing that both principal and interest was at hazard. The present case is fully before the Court, and proper for the exercise of their judgment. To say it is usury, the Court must be convinced that it was the design of the defendant to make a loan of this, and to secure exorbitant profit for it, and calculated as a shift to evade

the statute. But I cannot think, either from the evidence or the answer of the defendant, that it was the scheme, or even in contemplation of the party. It appears a mere wager which of the two should outlive the other. The 5000*l.* was actually advanced, not colourably: therefore, none of the cases cited prove this to be within *the Statutes of Usury, or warrant the Court [*575] to declare it void thereon. The word "lend," on which [*575] some stress was laid, concludes nothing. Every advancement of money on bottomry is a loan, and it was properly observed to be called so in the acts of Parliament; but it is the nature of the agreement and intent of the parties into which the Court must look to determine the question. Cro. Eliz. 642, puts it entirely on the question, whether it was the intent of the parties to be a wager or a loan at interest. So in Mo. 398, it has been argued, that lending money on bottomry, when more is taken than the legal interest, is grounded on the consideration of the profit to trade; and, therefore, it is said not to be applicable. That certainly has been one reason why so large a profit for the use of money has been allowed in that instance; but the general reason has been, the not coming within the intent of the statute; for, if it had, the Court could not depart from it: but the hazard the lender runs, of never seeing a penny of his principal, or any of the interest, takes it out thereof; and that holds as strong in the present case; and is so laid down in general, where the principal and interest is in hazard: 1 Sho. 8, *Mason v Abdy*: and in Sid. 27, a diversity is taken between a bargain and a loan, whether a hazard, or not, is considered as the rule for determining whether a bargain or loan. I am of opinion, therefore, this bond does not come within the Statutes of Usury, and cannot be declared void at law thereon.

On the *next* question, as the advice I shall offer will be grounded entirely on what was done by Mr. Spencer after the death of the duchess, was I to suppose, for argument's sake, the plaintiffs were entitled to the relief prayed, I shall offer nothing as a determination of that branch of this case, though it may not be improper to throw out something in general. I see no reason to quarrel with the principal cases cited as the ground for the interposition of a Court of equity. On the contrary, I cannot help declaring I concur with those determinations, and do not mean in the least to abate the force of them. In the *present case there [*576] are certainly many circumstances that cast a favourable light on the defendant's part of the transaction. He does not appear to be a person having an intent of fraud. The scheme¹ moved not from him, but from Mr. Spencer, on whose own terms the money was advanced without any haggling on the part of the defendant, after it was refused by others as not a desirable contract on the calculation of chances. Not that the hands of

¹ See also *Townsend v. Lowfield*, Belt's Supp. to Ves. 31. But it seems such a circumstance ought to have little weight; *Evans v. Chesshire*, Belt's Supp. to Ves. 300, 306.

the Court are tied up from relief from the want of fraud or imposition. I have no jealousy of anything of that in this case. Yet cases may be wherein this Court would interpose to prevent improvident persons from spending or ruining their estates before they come to them, though no proof of actual fraud or imposition; which is agreeable to the saying of Lord Jefferies, in *Berny v. Pitt*,¹ when he reversed Lord North's decree. So it was considered in *Twistleton v. Griffith*,² and in *Curwyn v. Milner*.³ The necessity must be seen by every wise and considerate person. The Courts keep a strict hand over these agreements, which must, indeed, all stand on their own particular circumstances; and, perhaps, it is not advisable to lay down any general rule about them, or more than is necessary to the relief in each particular case.

I therefore, without offering any advice on the bond in 1738, abstracted from the subsequent transaction, I will proceed to the *third* question; upon which I am of opinion, that the plaintiffs are entitled to no other relief against the bond and judgment in 1744, but, as to the penalty, on payment of what remains due, and the interest from the death of the grandmother: and though I have given no opinion upon the former part of the transaction, yet I must take up this, as considering the plaintiffs entitled to the relief prayed, as the case stood on the first agreement. And here it is not improper to take a short view of the different situation in which Mr. Spencer appears in 1744, from what he was in 1738. When the first bond was given, he was, notwithstanding a large income, involved in great difficulty for want of money to [*577] *pay creditors, casting about every way for a present supply, and suffering dangerous schemes to be privately hawked about, fearful lest it should come to his grandmother's ears that he was mortgaging his expectations from her. It is not very clear who took the first step toward the new engagement after her death; the bond was not given until near two months afterwards, though dated the next day after, in order that it might carry interest from thence. But supposing the defendant had called on Mr. Spencer for his money before the 31st of October (which, from his genteel behaviour in other parts, I can hardly think he did), yet there is no circumstance of force on Mr. Spencer; and the security then standing out against him, was only a bond for payment of the money, not a judgment on which immediate execution could be sued; which bond would have given him time enough to turn himself about, before he would be under a necessity to be exposed to an execution. It appears to be his fixed design, after her death, to pay off the whole as fast as he could, and that with a preference to the defendant, who, he said, had treated him like a gentleman. The defendant declared he would not press him for his money, although he should be glad to have it; and Mr. Spencer executed the bond and warrant of attorney freely and voluntarily, and well pleased therewith. It may be

¹ 2 Vern. 14.² 1 P. Wms. 810.³ 3 P. Wms. 293, n.

said that all this proceeded from his not being apprised that there could be relief in equity against the first bond. In *Cole v. Gibbons*,¹ the bill for relief and the answer, were both read to the party, and yet the assignment was confirmed; which circumstance, greatly weighing with Lord Talbot, is not wanting in the present case; it is what the defendant himself may make use of on his part, and it will be evidence for him, viz., that he answered to the manager of Mr. Spencer that he doubted whether the security would be good, and therefore only desired a note or memorandum; so that, from this doubt of the defendant, Mr. Spencer was apprised of the possibility of relief he had, if he applied to a Court of equity; which show he acted with his eyes open in this *article of confirmation—that it was not a sudden, [*578] but deliberate act, and agreeable to that frame of mind he continued in to his death, as appears from his subsequent letters.

Contracts of post obits are to be discouraged; and though the relief is not granted in the present case, yet should the Court hold a strict hand over these sort of contracts. How this would be in the case of a young heir under parental authority I do not say. It may be improper to forejudge such a cause; but inconvenience there can be none in the determination of this. Yet, in giving my opinion and advice in this very particular case against relieving the plaintiffs, I am far from blaming the plaintiffs, who are trustees for the infant, for submitting the case to the consideration of the Court, which I think very rightly done.

LEE, C. J.—The *first* point is, whether, on the evidence before the Court relating to this transaction, there is sufficient appearing to determine this contract to be usurious. As to the nature of usury, considering it at common law, or in the law of nature, or Divine law, or the civil law of other countries (of which there is a large account in Pal. 291), it is unnecessary to spend time on that subject, because the idea of usury is fully settled in this country by the legislature, which has made use of all the words the language could furnish to prevent taking more than the legal interest, in which usury consists; and, to attain this end, the borrower is at liberty to disclose every circumstance in his contract, that it might appear whether there was any shift, &c. It appears, by 2 And. 15, and *Mason v. Abdy*, Carth. 67, where the difference is taken and settled, that, where the hazard of losing the principal is but a colourable contingency, the agreement is usurious: but where the contingency is real and forcible, it is otherwise. I think that is the material consideration, and the substantial and true reason that bottomry bonds are not considered as usurious on the construction of the statute itself, there not being words *in the statute to reach bottomry bonds [*579] when they run a desperate contingency of winds, seas,

¹ 8 P. Wms. 290.



and enemies, the reasons touching trade not being the true reasons, although they might be inducements to Courts to construe the statutes in a favourable way. So, if on advancement of money by way of loan, the lender will, by an agreement between the parties, in whatever manner formed, have the repayment of the principal, with profit exceeding the legal interest; that will be corrupt within the Statute of Usury. If, therefore, two persons speaking together, one desires 100*l.*, and for the loan will give more than the law allows, and for evasion of the statute a practice is invented that the borrower shall grant to the lender 30*l.* per annum for so many years, this practice is within the statute, and will be usury, although the lender never has his 100*l.* again; for by this bargain by way of loan he has full satisfaction for his 100*l.*, and more profit than the law allows; which is 1 Bul. 36, which brings the present case to the single consideration, whether the hazard the defendant ran of losing the whole principal, without satisfaction for the money advanced, was not a real hazard, which might require a reward beyond the legal and common interest; and where that is the case, it appears, from all the authorities, that all bottoms on this in Courts of law—that it is always thought, where the profit the lender is to have is as a reward for the hazard he is subject to, and not for the forbearance of the day of payment (which are the words of the statute), they are not usurious. In Molloy, 314, 317, it appears these real contingencies are not within the Statutes of Usury on this foundation.

But, on the *second* point, I think it will be well worth the consideration of a Court of equity whether they will not interpose in case of these hazardous bargains to pay double so as to prevent the lenders going away with such an exorbitant gain. It is difficult to form any general rule that can meet every case of this kind that may happen; but they must in general be governed by the circumstances in each case: only this may be always proper [*580] *to be attended to, as far as may be, to bring all contracts that are in nature of loans to that mean prescribed by Parliament, that none take more than the legal interest; and by the cases cited and stated in Courts of equity, it appears they have used a sagacious attention to discover whether there is any fraud expressed, or, from the nature of the transaction or person concerned, anything carrying on the face of it an appearance of imposition; as, in the case of young heirs, &c., a Court of equity has disabled from taking advantage thereof, and interposed to prevent unconscionable bargains. That, therefore, is a matter worth the regard of a Court of equity, so as to prevent all trade of this sort, such as is called Jewish interest, which seems a malum conusabile at common law.

What has been done by Mr. Spencer, after the death of the duchess, prevents the Court from entering minutely into the consideration of the first contract; for any objections thereto are taken away by himself, in whose place the plaintiffs stand. The

first contract, surely, might recover strength, and be validated by the intervention of a new case that was fit to create a right. If he was under apprehensions of his grandmother when the first security was given, yet they were at an end at the last. If he was an infant when he gave the first bond, the contract would be voidable as to him; but if, when of full age, he gave a new bond, it would be good against him. In the case in Dom. 136, called the Macedonian decree (*De Senatu Consulto Macedoniano*, Dig. lib. xiv. tit. v. 1), it is said, that if any creditor lent money for a just and reasonable cause, sufficient to support the equity of the obligation, it was by a favourable interpretation of the decree of the senate excepted from the general prohibition, according to the quality of the use to which the money was put. The defendant has this exception in his favour—the use of his money being to pay just debts to tradesmen; for if these contracts are to be set aside upon the hatred to the creditor who has made an improper loan, yet that imputation is taken away: and even in the case of a son, if the father approves or ratifies the obligation by paying part, or the son acquits it himself, [*581] it cannot be revoked: Dom. 137, 138, in his observations upon that decree. But it is said, that though Mr. Spencer was not under the same difficulty when he gave this new security as at the giving the first bond, yet he was a debtor then to the defendant, and liable to be called on by legal proceeding; but that cannot be a reason to set aside this deliberate act of Mr. Spencer, against whom there was then no process, but a readiness in his creditor to take paper security instead of money, which he had a right to. I rely on 3 P. Wms. 290,¹ as a stronger case than this, being a deliberate act confirming an unreasonable bargain when the party was fully informed of everything, and under no surprise: that made it good. In *Cann v. Cann*, 1 P. Wms. 727, Lord Macclesfield says, there is no colour to set aside a release which the maker had a right to make, and was not ignorant of his right, and that solemn conveyances are not slightly to be blown over. I entirely concur, therefore, in opinion.

LORD CHANCELLOR HARDWICKE.—Before I proceed to give my own opinion in this case, I must take notice that Lord Chief Justice Willes has signified to me his entire concurrence on these three points.

Next, that the great and able assistance I have had in this case has made my task extremely easy; and, as I concur in the decree I am advised to make, the great pains taken in clearing up and considering the points might have excused me from taking up any time. One thing I ought to say in the outset—that if I could have foreseen upon what particular point the judgment in this case would fundamentally turn, I should have spared the judges the trouble of this attendance. As three points have

¹ *Cole v. Gibbons*.

been properly made at the Bar, it is necessary to say something to each.

The *first* is a mere question of law upon the Statutes of Usury¹ and on the rules of law, and the same as in a Court of law, if an action had been brought on the bond, and the whole matter had [*582] been disclosed in special pleading. *If I had even now a doubt concerning it, I should have held myself bound by the opinion of the judges, as a matter within their conusance, in like manner as if I had sent this to be tried at law; in which case the Court always decrees consequentially to the trial. But I have no doubt about it, and concur in opinion. This question was laboured by the plaintiff's counsel; many authorities cited; strong inferences made by them. I do not intend to go through them; but contracts on contingency are to be distinguished plainly, for a wager on chance is not within the statute, because no loan. But if there is a loan of money, with an agreement to receive back more than the principal and legal interest in any event, there, though a contingency is thrown in, on which the whole principal and interest may be lost by possibility, it is usurious, and contrary to the statute. On this it was insisted for the plaintiffs. I will not now enter into a critical dispute how far any such contract, where, by the falling out of the contingency one way or other, the money may be lost, is in strictness a loan. The civil law has very nice and refined distinctions upon this; "*commodatum*" and "*mutuatum*," are there technical terms for a loan. By the first was meant, where the things lent were to be restored *in specie*; by the second, where *in genere* only: but in both the things were to be restored in all events, and nothing was to be paid for the use or hire; which, when it was so, was "*locatum*" and "*conductum*," by the Roman lawyers, under which, perhaps, all our laws would strictly come. But these minute distinctions upon loans are not adopted by us; but we mix and confound their "*commodatum*," and "*mutuatum*," as appears in an action upon a loan, which takes in both. So, though interest is to be paid for it, it is with us still a loan: so, though money is to be advanced upon a risk, which upon a contingency may be totally lost, it is still a loan of money; and all the books treating of bottomry call it money lent on bottomry. Besides, this is plain by the express words of the stat. 11 Hen. 7, c. 8, which shows they understood that an adventure might be [*583] inserted in a *contract of a loan; and it is observable that this, if real and fair, exempted it from the laws of usury; though at that time all kind of usury, or taking interest, was unlawful. By the law of England, therefore, the insertion of a contingency will not of itself prevent a contract being a loan. Consider the result of the cases cited on the Statutes of Usury, which I will not repeat, but only deduce proper and natural inferences from them. *First*, if there is a loan on contingency, in

¹ The laws against usury are now abolished. See 17 & 18 Vict. c. 90.

consideration whereof a higher interest than the law allows is contracted for forbearance, if the risk goes only to the interest or premium, and not to the principal also, though real and substantial risk is inserted, it is contrary to the statute, because the money lent is not in hazard, but safe in all events; and no regard is then had whether the contingency is real or colourable, as appears from what Doddridge, J., says in *Roberts v. Trenayne*,¹ who, by the way, takes it for granted that such a loan may be with us on contingency. *Next*, if the contingency extends to both, and there is a higher rate than the law allows, regard is had, whether a bona fide risk is created by the contingency, or whether only colourable; for, if so, Courts of law hold it contrary to the statute, because it is an evasion to get out of the statute, which is prohibited by the law itself: *Clayton's case*, 5 Co. 70; and in the case put by Popham in *Burton's case*,² immediately preceding. So in *Mason v. Abdy*. But where the contingency has extended to principal and interest both, and not colourable only, but a fair and substantial risk is created of the whole, it takes it out of the statute: though called a loan, it is considered as a bargain on chance, and differs little from a wager. On this depends the case of bottomry; for I agree, that the approving thereof is from their being fair contracts on a real hazard, and not that they concern trade; though trade and commerce is taken into consideration, but not alone relied on to support usury, for that cannot be. The plaintiff's counsel object to this, by laying stress on certain expressions and dictums of judges in some cases, that there must be no *transaction or communication of borrowing and lending; and care must be [*584] taken that there be no such: and, therefore, as the first proposal in the present case was to borrow money on a contract to pay two for one, it is usurious, notwithstanding the contingency thrown in. A very right answer has been already given, that Courts of justice are to regard the substance of things on a contract, and not mere words, which might be inaccurately used by the parties in private dealing. But another answer may be given—that in the most accurate books these expressions are applied to cases arising on purchase of an annuity, or sale of goods and merchandise, at a premium or advanced profit beyond the rate of legal interest; in which cases these expressions are properly applicable, but cannot be so to loans on contingency—that is, a fair, real contingency; for there, from the nature of the thing, the communication must be about a borrowing and lending, as is plain from the case of bottomry; and the case put by Doddridge, J., in terms, is of lending 100*l.*, &c., upon a casualty: if it goes to the interest only, and not the principal, it is usury; which he clears by the case of bottomry. The very stating of the case on the purchase of an annuity or sale of goods proves the truth of this. An annuity may be purchased at as low a

¹ 2 Roll. 47; Cro. Jac. 508.² 5 Co. 68.

rate as you can, provided it was the original negotiation to purchase and sell an annuity; but if the treaty began about borrowing and lending, and ends in the purchase of an annuity, it is evident that it was only a method or contrivance to split the payment of the principal and usurious interest into several instalments, and consequently that it was a shift; which is *Fuller's case*, and *Tanfield's case*, 4 Leon. & Noy, 151, which I take to have been on the same deed as that in 1 Bronlow. So, in the sale of goods or merchandise, it is lawful to sell as dear as you can, on a clear bargain by the way of sale; but if it is first proposed to borrow, and afterwards to sell goods beyond the market, this is usurious; of which there are two cases in Mo. 397. The very putting these cases shows how proper and forcible those expressions of the judges before mentioned are, *when used [*585] in the purchase of an annuity and sale of goods; but how improper when thrown out in cases of loans of money on contingency.

The *second* question is, supposing the first contract to be valid in law, whether it was contrary to conscience, and to be relieved against in this court upon any head or principle of equity. I will follow the prudent example of not giving any direct and conclusive opinion. As it would be unnecessary, it is the safest not to do it; yet it has been made necessary to say something on it. It cannot be said that such contracts deserve to be encouraged, for they generally proceed from excessive prodigality on one hand, and extortion on the other, which are vitia temporis, and pernicious in their consequences; and then it is the duty of a court, if it can, to restrain them.

This Court has an undoubted jurisdiction to relieve against every species of fraud.

First, then, fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition; which is the plainest case.

Secondly, it may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other, which are unequitable and unconscientious bargains; and of such even the common law has taken notice: for which, if it would not look a little ludicrous, might be cited *James v. Morgan*, 1 Ley. 111.¹

A third kind of fraud² is, which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that it must be

¹ This case is thus quaintly reported by Levinge: "Assumpsit de payer pur un chival, un Barly-corn a nail, et double every nail; et averr que la feurent 32 nails en les soliers del chival, que dublant chescun nail, veignant al 500 quarters de Barly. Et sur non assumpsit, le cause esteant try devant Hide al Hereford, il direct le jury pur donner le value del chival en damages esteant £8. Et issint ils fesoient et fuit apres move en arrest de judgment pur un petit fault en le declaration, que fuit over-rule; et judgment done pur le plaintiff.

² Fraud presumed from the circumstances and condition of the parties.

proved, not presumed: but it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another, which *knowingly to do is equally [*586] against conscience as to take advantage of his ignorance; a person is equally unable to judge for himself in one as the other.

A fourth kind of fraud may be collected or inferred, in the consideration of this Court, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement. It may sound odd, that an agreement may be infected by being a deceit on others not parties; but such there are, and against such there has been relief. Of this kind have been marriage-broage contracts, neither of the parties herein being deceived; but they tend necessarily to the deceit on one party to the marriage, or of the parent, or of the friend. So, in a clandestine private agreement to return part of the portion of the wife, or provision stipulated for the husband, to the parent or guardian. In most of these cases it is done with their eyes open, and knowing what they do; but, if there is fraud therein, the Court holds it infected thereby, and relieves. So, where a debtor enters into a deed of composition with his creditors for 10s. in the pound, or any other rate, attended with a proviso that all creditors executed this within a certain period, if the debtor privately agrees with one creditor, to induce him to sign this deed, that he will pay, or secure a greater sum in respect of his particular debt—in this there can be no particular deceit on the debtor who is party thereto, but it tends to deceit of the other creditors, who relied on an equal composition, and did it out of compassion to the debtor.¹ This Court, therefore, relieves against all such *underhand bargains*. So, of premiums contracted to be given for preferring or recommending to a public office or employment: none of the parties are defrauded; but the persons having the legal appointment of these officers are or may be deceived thereby: or if any person, agreeing to take the premium, has authority to appoint the officer, it tends to public mischief, by introducing an unworthy object for an unworthy consideration. These cases show what Courts of equity mean when they profess to go on reasons drawn from public utility. *To [*587] weaken the force of such reasons, they have been called political arguments, and introducing politics into the decision of courts of justice. This was showing the thing in the light which best served the argument for the defendant, but far from the true one, if the word “politics” is taken in the common acceptation; but if in its true original meaning, it comprehends everything that concerns the government of the country, of which the administration of justice makes a considerable part; and in this sense it is admitted always. To apply this: thus far, and in this sense, is relief in a court of equity founded on public utility.

¹ *Mare v. Sandford*, 1 Giff. 288.

this is the point on which the determination of this case will depend, and I entirely agree with the opinion delivered already. Had the first bond been void by the Statutes of Usury, no new engagement would have made it better; the original would have infected it. But if a man is fully informed, and with his eyes open, he may fairly release and come to a new agreement, and bar himself of relief, which might be had in this Court. The material inquiry is, whether this was done, after full information, freely, without compulsion, &c.; and upon the best consideration of the evidence, it appears to be so done, and with fairness.

First, the condition of the necessity of Mr Spencer was over: for though he had no power over the capital of this accession of estate, yet it was so great a one, that little more than one-third of a year's income would have paid off the whole. If that, then, be a state of necessity, how far shall it be carried?

Then the state of expectancy was over by the death of the duchess, and also the danger of her coming to the knowledge of his conduct and circumstances, and his fear of offending her, which was the principal restraint upon him; so that there was no ancestor or relation left upon whom any deceit could be committed in consequence of any new agreement; and it appears, that, before this new bond, he had sufficient notice that he had a chance, at least, that he might have relief in equity, from the defendant's own declaration to him of his doubt whether it would be good.

[*591] *Lastly*, there was no impediment against his seeking *relief by disclosing the whole case at that time in a court of justice.

Under these circumstances was the new engagement, without any fraud, contrivance, or surprise to draw him in, which operates more strongly than the deed of confirmation in *Cole v. Gibbons*, that it is too much to set it aside. The only difference to distinguish that from this case was, that there the releasor was not in the power of the releasee: here Mr. Spencer was debtor,¹ and his creditor might immediately have distressed him by an action: but the answer is, there was neither an attempt nor threat to bring an action. It is objected further for the plaintiffs, that *Cole v. Gibbons* was a single case; and there are several precedents in which such new security and subsequent transaction was not sufficient to give a sanction to a demand of this kind, as in *Lord Ardglass v. Muschamp*; but the circumstances there show it not to be at all applicable. Then the confirmation in *Wiseman v. Beak* was still more extraordinary; and that was a very extraordinary invention of Serjeant Philips, of a bill to be foreclosed against a relief in equity. In both those cases the original transaction was grossly fraudulent; but I have only shown it here to be a doubtful object of relief in this Court,

¹ See *Fox v. Mackreth*, ante, p. 115.

which surely is the most proper case of all others to put an end to by a new engagement.

On the whole, therefore, the only relief is that which I am advised to give against the penalty of the last bond.

The only doubt which could arise on this is as to costs, to which the defendant is not entitled. The plaintiffs are only executors; they had a probable cause of litigating this contract, which is far from deserving favour, and were in the right to submit it to the judgment of the Court; and it is observable, that in *Cole v. Gibbons*, which was on this point, the bill was dismissed without costs, and no costs given on the bill, but, on the contrary, deducted. There was, indeed, in that case, no penalty, as there is here; but still that does not take away the discretion of this Court in respect of costs, according to *the cir- [592] cumstances of the case: and there are several cases of a bond with a penalty disputed, where, though the costs at law will undoubtedly follow the demand, yet, on the circumstances, costs in this Court are refused.

Therefore, let it be referred to the Master to take an account of the principal and interest due on the bonds of 1744, and the judgment thereon, and to tax the defendant his costs at law, and an account of the money paid by Mr. Spencer to the defendant; and let that first be applied to discharge the interest, and then to sink the principal, and all just allowances be made; and, on payment by the plaintiffs to the defendant of what is found due, let the defendant deliver up the bond to be cancelled, and acknowledge satisfaction on the judgment: but that must be at the expense of the plaintiffs. And, if the plaintiffs pay what is so found due, let there be no costs in this Court on either side; but, otherwise, let the bill be dismissed with costs.

Chesterfield v. Jansen is a case of very frequent reference, celebrated alike for the able arguments of the counsel on both sides, and for the opinions of the learned judges who assisted Lord Hardwicke, but above all for the elaborate and learned judgment of Lord Hardwicke himself, in which he has so admirably classified the different species of frauds against which equity will give relief.

It is proposed in this note to consider only the last head of frauds mentioned by Lord Hardwicke—viz., that which infects catching bargains with heirs, reversioners, or expectants. “These,” observes his Lordship, “have been generally mixed cases, compounded of all or several species of fraud, there being sometimes proof of actual fraud, which is always decisive. There is always fraud *presumed or inferred* from the circumstances or conditions of the parties contracting—weakness on the one side, usury on the other, or extortion or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain. . . . In most of these cases

have concurred deceit and illusion on other persons not privy to the [593] fraudulent agreement. The *father, ancestor, or relation from whom was the expectation of the estate, has been kept in the dark; the heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief, and also reformation: this misleads the ancestor, who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons, who have divided the spoil beforehand."

Before, however, entering upon this important subject, it may be remarked, that mere inadequacy of price, unless it be the result of fraud, surprise, or misrepresentation (*Pickett v. Loggon*, 14 Ves. 215; *Reynell v. Sprye*, 8 Hare, 222; 1 De G. Mac. & G. 660; *Summers v. Griffiths*, 35 Beav. 27), is not a sufficient ground to set aside a purchase of interests in possession, but the inadequacy may be so gross as to be of itself clear evidence of fraud. "To set aside a conveyance," says Lord Thurlow, "there must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it:" *Gwynne v. Heaton*, 1 Bro. C. C. 8; and see *James v. Morgan*, 1 Lev. 111; *Stillwell v. Wilkins*, Jac. 280; *Rice v. Gordon*, 11 Beav. 265; *Longmate v. Ledger*, 6 Jur. N. S. 481; *Haggarth v. Wearing*, 12 L. R. Eq. 320; *Tennent v. Tennents*, 2 L. R. Ho. Lo., Sc. App. 6; *Butler v. Miller*, 1 I. R. Eq. 195.

But with regard to expectants and reversioners (in cases not coming within the operation of 31 & 32 Vict. c. 4, and the modifications in the law introduced thereby, which will be hereafter noticed), the authorities clearly show, even in the absence of the different species of frauds which, as before observed, are frequently ingredients in such transactions, that mere inadequacy of price is a sufficient ground for rescinding contracts or dealings with them for their expectancies or reversionary interests. Thus, where an heir borrows money upon a post-obit bond or otherwise upon a mere expectancy, or sells it, a court of equity will set aside the transaction if it is unreasonable, or the price is inadequate: *Curwyn v. Milner*, 3 P. Wms. 293, n.; *Peacock v. Evans*, 16 Ves. 512; and see *Freme v. Brade*, 2 De G. & Jo. 582.

The rule is also applicable where the expectancy is an interest in remainder, after the death of the father or any other relation: *Freeman v. Bishop*, 2 Atk. 39; Barnard Ch. Rep. 16. Thus, where a son, tenant in tail in remainder, has, during the life of his father, sold his interest in the estate at an under-value, the sale has been set aside.

[594] See *Nott v. Hill*, 1 Vern. 167; 2 Vern. 27; 2 Ch. Ca. 120; *2 Cox, 80, cited; *Twistleton v. Griffith*, 1 P. Wms. 310.

So, likewise, where a reversioner has mortgaged his estate, or has granted an annuity, or has given a bond or other security for the payment of a sum of money or an annuity at the death of his father, the

transaction will be set aside if it appears to be unreasonable, or the price inadequate: *Barney v. Beak*, 2 Ch. Ca. 136; *Wiseman v. Beake*, 2 Vern. 121; 2 Freem. 111; 1 Eq. Ca. Ab. 91; *Berny v. Pitt*, 2 Vern. 14; 2 Swanst. 142, n.; 2 Ch. Ca. 391; 2 Ch. Rep. 396; 1 P. Wms. 312, cited; *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Gowland v. De Faria*, 17 Ves. 20; *Evans v. Cheshire*, Belt's Supp. to Ves. 300; *Kay v. Smith*, 21 Beav. 522; *Smith v. Kay*, 7 Ho. Lo. Ca. 750; *Bromley v. Smith*, 26 Beav. 644; *Pennell v. Millar*, 23 Beav. 172; *Tottenham v. Emmett*, 13 W. R. (M. R.) 123; 14 W. R. 3; *Re Unsworth*, 13 W. R. (V. C. K.) 448. And see *Benyon v. Fitch*, 35 Beav. 570, where the Court, under the circumstances, held the mortgagee entitled to the amount for which the mortgagor had given bills, and not simply to the money actually advanced upon them.

The application of the rule is not prevented by the fact, that the expectant heir was a person of mature age (*Earl of Portmore v. Taylor*, 4 Sim. 182; *Davis v. The Duke of Marlborough*, 2 Swanst. 143), nor that he perfectly understood the nature and extent of the transaction; nor is it necessary for the heir to show that he was in pecuniary distress at the time; *Bromley v. Smith*, 26 Beav. 644.

A sale of a reversion, and a grant of a reversionary lease, stand upon the same principles: *Grosvenor v. Sherratt*, 28 Beav. 659.

Mr. Swanston, in his learned note to *Davis v. Duke of Marlborough*, 2 Swanst. 140, seems to think that, in order to constitute a title to relief, the reversioner must also combine the character of heir; and he observes, "that the reversionary interests, the sale of which had been rescinded for mere inadequacy of price, were expectant on the decease of a parent or other lineal ancestor in every case except the following: *Wiseman v. Beake*, 2 Vern. 121; 2 Freem. 111; 1 Eq. Ca. Ab. 91; *Cole v. Gibbons*, 3 P. Wms. 290 (for the original transaction in which, unconfirmed, Lord Talbot considered the plaintiff entitled to relief); *Barnardiston v. Lingood*, 2 Atk. 133; *S. C.*, Barnard. Ch. Rep. 138; *Bowes v. Heaps*, 3 V. & B. 117;—they were expectant on the decease of the reversioner's uncle, and in *Gould v. Oakden*, 4 Bro. P. C. 198, Toml. ed., on the decease of the wife's father. But in all these cases the sale had been transacted while the vendor was in distress."

In nearly all these cases, it is true, distress actually exists; but the modern authorities show, that, *as distress or inequality is [*595] always presumed to exist, the onus lies upon the person dealing with a reversioner or expectant, even although he does not combine the character of heir, to show that the transaction is reasonable, or the price given adequate (*Gowland v. De Faria*, 17 Ves. 70; *Woodroffe v. Allen*, 1 Hay & J. 73; *Bawtree v. Watson*, 3 My. & K. 339; *Edwards v. Browne*, 2 Coll. 100; *Sewell v. Walker*, 12 Jur. 1041; *Davies v. Cooper*, and *Cooper v. Jackson*, 5 My. & Cr. 270; *Addis v. Campbell*, 1 Beav. 258; *King v. Savery*, 1 Sm. & Giff. 271; 5 H. L. Cas. 627;

Edwards v. Burt, 2 De G. Mac. & G. 55; *Bromley v. Smith*, 26 Beav. 644; *Salter v. Bradshaw*, 26 Beav. 161; 28 L. J. (N. S.) Ch. 426; *St. Albyn v. Harding*, 27 Beav. 11; *Foster v. Roberts*, 29 Beav. 467; *Jones v. Ricketts*, 31 Beav. 130; *Sharp v. Leach*, 31 Beav. 491; *Talbot v. Staniforth*, 1 J. & H. 484, 10 W. R. (L. C.) 829; *Dally v. Wonham*, 33 Beav. 154; *Benyon v. Fitch*, 35 Beav. 570; but the court will sometimes direct an inquiry as to the value: Sugd. V. & P. 276, 14th ed.).

The history and policy of the doctrine are thus clearly commented on by Sir J. Leach, V. C.: "At law, and in equity also," observes his Honor, "generally speaking, a man who has a power of disposition over his property, whether he sells to relieve his necessities, or to provide for the convenience of his family, cannot avoid his contract upon the mere ground of inadequacy of price. A court of equity, however, will relieve expectant heirs and reversioners from disadvantageous bargains. In the earlier cases it was held necessary to show that undue advantage was actually taken of the situation of such persons; but in more modern times it has been considered not only that those who were dealing for their expectations, but those who were dealing for vested reversions also, were so exposed to imposition and hard terms, and so much in the power of those with whom they contracted, that it was a fit rule of policy to impose, upon all who dealt with expectant heirs and reversioners, *the onus of proving that they had paid a fair price*, and otherwise to undo their bargains, and compel a re-conveyance of the property purchased. The principle and the policy of the rule may both be equally questionable. Sellers of reversions are not necessarily in the power of those with whom they contract, and are not necessarily exposed to imposition and hard terms; and persons who sell their expectations and reversions, from the pressure of distress, are thrown by the rule into the hands of those who are likely to take advantage of their situation; for no person can securely deal with them: 3 Madd. 235. Lord Thurlow, however, fully approved of the principle *upon which sales of expectant interest by heirs are [*596] set aside. "For," observes his Lordship, "there is a policy in justice protecting the person who has an expectancy, and reducing him to the situation of an infant, against the effect of his own conduct. The heir of a family, dealing for an expectancy in that family, shall be distinguished from ordinary cases; and an unconscionable bargain made with him shall not only be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle, and therefore repressed:" *Gwynne v. Heaton*, 1 Bro. C. C. 9.

In all these cases one ground for setting aside such dealings exists in nearly the same degree, viz., that the parties do not meet upon equal terms—there is distress on one side, and greediness of gain on the other; but, where the reversioner or expectant is also heir, there is an additional reason for the interposition of equity—"the policy of the

nation to prevent what was a growing mischief to ancient families, that of seducing an heir-apparent from dependence on his ancestor, who probably would have supported him, and, by feeding his extravagances, tempting him, in his father's life-time, to sell the reversion of that estate which was settled upon him, forasmuch as this tended to the manifest ruin of families."—Per Lord Talbot, 3. P. Wms. 293. And where a mere expectant deals with his expectancy, a fraud is committed upon the ancestor or person from whom the spes successionis is entertained. "A man," to use the words of Mr. Justice Burnett, in the principal case, "may be giving his estate to a money-lender instead of the person intended; and every one disguising the truth from a man who has a right to the truth is wrong, and ought not to be encouraged: and by this delusion he gives his estate to strangers, when he thinks he is giving to his heir or relations, and when, if he had known the truth, he would have provided for that heir or relation, so as to prevent his beggaring himself."

Although the purchaser of a reversion at an undervalue subsequently sells it for its full value, the original vendor may set the transaction aside as against the second purchaser, if he had notice that the original sale was at an undervalue: 32 Beav. 282; *Nesbitt v. Berridge*, 11 W. R. (M. R.) 446.

It may be here mentioned, that a fair agreement between expectants or heirs, to divide the property which may be left between them, or to any one of them, is not contrary to public policy, and will be enforced in equity. Thus, in the leading case of *Beckley v. Newland*, 2 P. Wms. 182, the plaintiff, Beckley, and Sir George Newland, who had married two sisters, the presumptive heirs of *Mr. Turgis, a [*597] very rich man, entered into articles whereby they agreed, that whatsoever should be by will left to either of them should be equally divided between them. Mr. Turgis, who had made and revoked several wills, at length made a will in favour of Sir George Newland, whereby he left a great personal estate to Sir George. Upon a bill being filed by Beckley for a specific performance of the agreement, it was objected, that the articles to divide a man's estate while he was living, and to share that in which the parties, at the time of making the agreement, had no manner of right, and possibly might never have, were unfair, and not to be encouraged; that it was to disappoint the will of the testator, who in all probability would have given nothing to either of the parties to the agreement, in case he could have foreseen that his disposition would be frustrated as soon as ever he should die. However, Lord Macclesfield decreed a division of the personal estate, according to the articles. "Suppose," he observed, "there were two daughters, and the father should leave almost all the estate to the eldest, and nothing, or very little, to the youngest; if there should be such an agreement as in the principal case, surely it would have been

no more than what every one would have wished for." See also *Wethered v. Wethered*, 2 Sim. 183; *Harwood v. Tooke*, 2 Sim. 192; *Hyde v. White*, 5 Sim. 524.

If the bulk of the property sold be reversionary, the mere fact of a part of it being in possession (especially if colourably thrown into the contract, and it bears but a small proportion to the whole), will not prevent the application of the rule of equity with respect to sales of interests in reversion: *Davis v. The Duke of Marlborough*, 2 Swanst. 154; *Earl of Portmore v. Taylor*, 4 Sim. 182; and see and consider *Nesbitt v. Berridge*, 4 De G. Jo. & Sm. 54; 10 Jur. N. S. 53, reversing the decision of the M. R., 9 Jur. N. S. 1044; *Webster v. Cook*, 2 L. R. Ch. App. 544 n.; *S. C.*, on Appeal, *Ib.* 542, and the remarks thereon of Sir J. Stuart, V. C., in *Tyler v. Yates*, 11 L. R. Eq. 276.

It seems to have been thought at one time, that certain reversionary interests depending for instance upon marriage and birth of issue, were not capable of valuation, and Sir John Leach, M. R., said, "The probability that a bachelor of sixty-three will marry and have issue, depending upon the peculiar habits and disposition of the party, and the accidents of life, is not the subject of estimate or calculation; and I put out of my consideration, all evidence which affects to set a value on that contingency." See *Baker v. Bent*, 1 Russ. & My. 224; *Boothby v. Boothby*, 15 Beav. 213, n.

In that case, however, as the *purchaser had first contracted [*598] for the reversion without regard to the contingency, and afterwards upon the discovery of the contingency, had agreed to deduct a certain sum on account of it, his Honor took that to be the real value of the contingency, and upon that assumption directed a reference as to the value of the reversion.

It seems, however, that the Court would now receive evidence with regard to the value of a reversion affected by such a contingency, and if the contingency were very remote, no deduction would be made on account of it in estimating the value of the reversion. See *Baker v. Bent*, 1 Russ. & My. 224. And in *Davies v. Cooper*, 5 My & Cr. 270, where the interest was contingent upon the death of a lady without having had a child who should attain twenty-one, or who should die under twenty-one, leaving issue living at the lady's death; as she was thirty-five or thirty-six at the date of the agreement, and had been married eight years, and had never had a child, and as all the parties, of whom the husband was the principal, did not appear to have attached any importance to that contingency, Lord Cottenham was of opinion, that, in estimating the value of the reversion, it ought to be considered with reference only to her life.

In *Boothby v. Boothby* (1 Mac. & G. 604), a reversion expectant on the decease of a tenant for life aged fifty-six without issue (the tenant for life being married, and his wife being in her fifty-fourth year, and

the only issue of the marriage having been a still-born child eleven years previously), was held by Lord Cottenham, C. (overruling the decision of Sir L. Shadwell, V. C.; 15 Beav. 213 n.), to be capable of valuation. And upon a reference to ascertain the value of the reversion, which had been sold for 20*l.*, it having been found by the master to be worth 350*l.*, the sale was set aside: 15 Beav. 212. See also *Sherwood v. Robins*, 1 Mood. & Malk. 194.

Although, as a general rule, the onus lies on the purchaser of a reversionary interest to show that he gave a fair value (*Lord v. Jeffkins*, 35 Beav. 9), yet when the vendor has stated in his proposals the value of the corpus of the property, it lies upon the vendor to allege and prove that the value was understated: *Perfect v. Lane*, 3 De G. F. & Jo. 369.

Equity will also give relief, especially in the case of an expectant heir, against usurious loans, effected under the mask of trading, where, instead of money being actually advanced, goods are supplied by a tradesman, merely for the purpose of being at once sold, and will in general set aside such transactions upon payment of what the goods produced upon a re-sale, and interest: *Waller v. Dalt*, 1 Ch. Ca. 276; *S. C.*, 1 Dick. 8; *Barny v. Beak*, 2 Ch. Ca. 136; and see *Barker v. Vansommer*, *1 Bro. C. C. 149, in which case a young man, [*599] immediately upon coming of age, and wanting to raise money, gave a bond for the price of some silks to be resold by him. "I take it," said Lord Thurlow, on setting aside the transaction, "as an advancement of goods, instead of money to supply his necessities. It is a question of more difficulty what is the sum of which the account is to be taken—whether the value of the goods, or the sum really made. In the case in Eq. Ab. 91, the Court thought proper to charge the person only with what he really made of the goods; and this is the proper rule, for the person advancing the goods knows they are not to be sold in the shop, but in the lump, at a different kind of market, and that what can be got for them in that way is all that will redound to the benefit of the party to whom they are advanced: this leaves out of the case the value they were of to be sold in the shop."

However, in *King v. Hamlet*, 2 My. & K. 456, Lord Brougham, refused to relieve against securities given by an heir in necessitous circumstances, for the shop price of goods taken to a large amount, and immediately sold to raise money, at a loss on the whole transaction of 60*l.* per cent. The decision in this case was founded principally upon two propositions, which, if sustained by subsequent authorities, will form material exceptions to the doctrine of courts of equity as to the dealings with expectant heirs and reversioners. "Two propositions," said his Lordship, "I take to be incontestable, as applicable to the doctrines of this court upon the subject of an expectant heir dealing with his expectancy, and as governing more especially the present question. First, that the extraordinary protection given in the general case must

be withdrawn, if it shall appear that the transaction was known to the father, or other persons standing in loco parentis—the person, for example, from whom the spes successionis was entertained, or after whom the reversionary interest was to become vested in possession—even although such parent or other person took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him. Secondly, that if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not, in any respect, act upon it so as to alter the situation of the other party, or his property; at least, that, if he does so, the proof lies upon him of showing that he did so under the continuing pressure of the same distress which gave rise to the original dealing. Still more fatal to his claim of relief will it be

if the father, or person in loco parentis, *shall be found to have [*600] concurred in this adoption of the repudiated contract. . . .

The whole doctrine with respect to an expectant heir assumes that the one party is defenceless, and exposed, unprotected to the demands of the other, under the pressure of necessity. It would be monstrous to treat the contracts of a person of mature age as the acts of an infant, when his parent was aware of his proceedings, and did nothing to prevent them. The parent might thus lie by and suffer his son to obtain the assistance which he ought himself to have rendered, and then only stand forward to aid him in rescinding engagements which he had allowed him to make and profit by. If all the cases be examined, from the time of Lord Nottingham downwards, no trace will be found in any one of them of the father's or other ancestor's privity: on the contrary, wherever the subject is touched upon, his ignorance is always assumed as part of the case; and its being so seldom mentioned either way shows clearly that the privity of the father or ancestor never was contemplated. It is, however, several times adverted to in a manner demonstrative of the principle. In *Cole v. Gibbons*, 3 P. Wms. 290, the ground of this whole equity is said to be the policy of the law to prevent the heir being seduced from a dependence upon the ancestor, who probably would have relieved him. In the same spirit, Lord Cowper, in *Twissleton v. Griffith*, 1 P. Wms. 313, had before stated, as one effect of the law, its tendency, by cutting off relief at the hand of strangers, to make the heir disclose his difficulties at home. So in the *Earl of Chesterfield v. Janssen*, Mr. Justice Burnett treats such transaction as things done behind the father's back, and, as it were a fraud upon him—a view of the subject also adopted by Lord Hardwicke in the same case. It is as well to mention these cases, because there has been no decision upon the point: but it is quite a clear one, and only new because the facts never afforded a case for decision, the proposition having, apparently, never been questioned." The judgment of Lord Brougham in this case was affirmed in the House of Lords, 3 C. & F. 218; but Lord

Lyndhurst, in moving the judgment of the House, merely said that he saw no reason to dissent from the judgment of Lord Brougham in the Court below.

Lord St. Leonards, in his learned work on Vendors and Purchasers, p. 316, 11th ed., with great reason, questions the soundness of these propositions. "The first of these rules," he observes, "is supported by no previous authority, and as a general rule cannot, it is submitted, be maintained; the knowledge of the parent may, under some circumstances remove one of the objections to such a *transaction, but the others might still remain. The son is entitled to be relieved, [*601] although his father may witness his ruin with indifference. *It is the son's equity*, although partly grounded upon public policy. In many cases the person standing in loco parentis, or from whom the spes successionis is entertained, or after whom the reversionary property is to become vested in possession, may be more than indifferent about the worldly prospects of the expectant heir. Even in the case of father and son, how frequently we find the expectant spendthrift only following his parent's example! The second rule, without the concluding qualification, could not be safely acted upon. In the case of goods substituted for money, and a security given over the buyer's reversionary property, the heir may offer to return the goods if the seller will relinquish the securities. If the offer is refused, and the heir then sell them (which is simply accomplishing the purpose for which they were bought), it would not be possible to maintain that he had forfeited any equity which he originally had to impeach the transaction." See also the reasons for the appellant, Sug. V. & P. 1084, 11th ed., and Sug. H. of L. 65. See also *King v. Savery*, 1 Sm. & G. 271; 5 H. L. Cas. 627.

The repeal of the usury laws has not altered the rules of the Court as to dealings with expectant heirs, and, accordingly, where an extravagant young man, entitled in reversion to an estate, and very much pressed for money, had shortly after attaining twenty-one, given to a money-lender securities bearing an exorbitant rate of interest, they were ordered to stand as a security only for the sums actually advanced, and interest thereon at 5l. per cent. per annum: *Croft v. Graham*, 2 De G. Jo. & Sm. 155; and see *Tottenham v. Emmet*, 14 W. R. 3; *Barrett v. Hartley*, 2 L. R. Eq. 789; *Miller v. Cook*, 10 L. R. Eq. 641, 646.

The law relating to the sales of reversions has been altered by 31 & 32 Vict. c. 4, which enacts, that no purchase made bonâ fide and without fraud or unfair dealing, of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on the ground of undervalue. (Sect. 1.) The word 'purchase' in this Act shall include every kind of contract, conveyance, or assignment, under or by which any beneficial interest in any kind of property may be acquired. (Sect. 2.) This Act shall come into operation on the first day of Janu-

ary, 1868, and shall not apply to any purchase concerning which any suit shall be then depending."

The exception in the statute as to fraud and unfair dealing, leaves the law as to unconscionable bargains, as affecting reversionary interests, the same as it was before *the statute came into operation. [*602] See *Miller v. Cook*, 10 L. R. Eq. 641. There the defendant, a money-lender, having agreed with the plaintiff, who was just twenty-one years of age, and was in difficulties, to lend him 150*l.* on his reversionary interest under his father's will, exacted securities for 200*l.* with interest at 20 per cent. reducible to 10 per cent. on punctual payment, and advanced only 123*l.* but claimed interest on the whole amount secured, and there were immediate powers of sale on non-payment of principal and interest upon a certain day. The plaintiff, it seems, had been assisted by Mr. Ring, a solicitor, who, however, stated that he had not been accurately informed of the transaction. It was held by Sir John Stuart, V. C., that the transaction being unconscionable, the deeds executed by the plaintiff should only stand as securities for the monies actually advanced with interest at 5 per cent. "As to the argument," said his Honor, "on the recent statute (31 & 32 Vict. c. 4, s. 1) concerning dealings with reversionary interests, the exception in the statute as to unfairness leaves the settled law as to cases like the present untouched. Nor is the case of the defendant assisted by the presence of Mr. Ring, who appeared as the plaintiff's friend. The evidence shows that the advice of Mr. Ring was founded on misunderstanding or misrepresentation. But there is a great difference between the intervention of a third party in transactions of this kind, and where there is no pressure of necessity which the friend cannot relieve. In transactions of bounty, indeed, where the advice of a judicious and impartial friend may assist and regulate, and in transactions where the pressure, not of want and of necessity, but of a confidential relation between the parties, requires the impartial advice of a friend, the intervention of a third party is important. In the present case, besides the other objections to the contract, the terms of the powers of sale are oppressive, and put the plaintiff completely at the mercy of the defendant. The power to sell without any notice to the plaintiff enabled the defendant at any moment to extinguish the right of redemption." See also *Tyler v. Yates*, 11 L. R. Eq. 265, affirmed 6 L. R. Ch. App. 665, where Lord Hatherley, C., thus comments on the law relating to the sale of reversionary interests, and shows very clearly and concisely how far it has been affected by the acts repealing the usury laws and by the more recent Act of 31 & 32 Vict. c. 4. "The appellants," said his Lordship, "have urged upon me that the Court must obey the law which has repealed the former laws with respect to usury, and I have been told that the Court is bound by *the law which enacts that the sale [*603] of a reversionary interest is not to be set aside on the ground

of undervalue merely. I am one of those who believe that these changes in the laws are very wise in many respects. . . The legislature, however, has not repealed, and I believe will not repeal, the doctrines of this Court by which protection is thrown round unwary young men in the hands of unscrupulous persons ready to take advantage of their necessities. This case has in reality nothing to do with the amount of interest charged, though it is difficult in these cases to avoid entering into the question of consideration. That question is, however, of the very smallest importance if the Court can find that these young men have been fairly dealt with. I conceive the reason why the law as to sales of reversions was altered to be that the doctrines of this Court had been carried to an extravagant length on that subject. The protection of the Court with regard to the sale of reversionary interests was chiefly given to expectant heirs of real property, and was gradually extended to persons who had reversionary interests of any kind."

What dealings with reversionary interests are unimpeachable.—“The Court will not view transactions between father and son in the light of reversionary bargains, but will regard them as family arrangements.”—Per Lord Eldon in *Tweddell v. Tweddell*, T. & R. 13; and see *Heron v. Heron*, 2 Atk. 160; *Wallace v. Wallace*, 2 D. & W. 452; and in the absence of undue influence on the part of the parent they will be binding: *Bellamy v. Sabine*, 2 Ph. 425; *Firmin v. Pulham*, 2 De G. & Sm. 99; *Willoughby v. Brideoke*, 13 W. R. (M. R.) 515, *Ib.* (L. J.) 1056; and see the notes to *Huguenin v. Baseley*, and *Stapilton v. Stapilton*, vol. 2.

The principle on which the Court acts in discouraging mortgages, sales, and dealings with reversionary interests, has no application to a settlement by an heir in favour of his wife and children: *Shafto v. Adams*, 4 Giff. 492.

The sale of a reversionary interest by auction fairly conducted will render it unnecessary for the purchaser to show that he has given an adequate price; for the principle of the ordinary rule is not applicable to this case, because as there is no treaty between the vendor and purchaser, there can be no opportunity for fraud or imposition on the part of the purchaser; the vendor is in no sense in the power of the purchaser; and, moreover, the sale by auction is evidence of the market price. This was first decided by Sir John Leach, V. C., in *Shelly v. Nash*, 3 Madd. 232, who, when it was urged that pretended sales by auction might be used to cover *private bargains, observed, [*604] “where such cases occur, they will operate nothing.”

Where, however, the sale by auction takes place under such circumstances as to affect the purchaser with notice that he is dealing with a person in such distress that he does not use the ordinary precautions against a sale at an undervalue, the purchaser will not, it seems, be re-

lieved from the obligation of proving that he gave a fair price. Thus, in *Fox v. Wright*, 6 Madd. 111, where a bill was filed to be relieved against certain post-obit bonds, Sir John Leach, V. C., said, "The true effect of the case of *Shelly v. Nash* is, that every purchaser at a sale by auction of a reversion is not necessarily bound to establish that he purchased at a full price—that he may purchase under circumstances which make it as equitable that he should have the benefit of his bargain, without such proof, as if he had bought not a reversion, but an estate in possession. The question is, whether the present defendant purchased this post-obit bond under such circumstances. The particulars of sale disclose that the vendor was a young man about to raise a sum of 40,000*l.* upon post-obit bonds, payable at the death of his father, and that the sale of these bonds was to take place *without reserve*—that is, without any bidding on his part. Those who attended this auction necessarily, therefore, knew that the vendor was a young man in distress; that he was so much pressed for money that he undertook, with those who thought fit to be bidders, that he would not have recourse to those precautions by which every provident seller at an auction protects himself against an inadequate price; and I have to ask myself, in the language of the case of *Shelly v. Nash*, whether it can be considered that the vendor is not, in some sense, in the power of those who deal with him; and whether a sale by auction under such circumstances, affords fair evidence of the market price. At all events, the question in this cause is of too much importance to be decided incidentally upon this motion, and I must continue this injunction till the hearing, upon the terms of the plaintiff bringing into Court the auction price, together with interest at 5*l.* per cent. from the time of payment."

It is not, however, essential to the validity of a sale of a reversionary interest that it should be by public auction. "For if," as observed by Lord Cranworth, "previously to the sale of a reversionary interest, the vendor and purchaser concur in ascertaining from persons of competent skill and having knowledge of the property, and of all the circumstances likely to influence value, a well considered estimate of what the property would be likely to fetch on a sale, and act on that opinion, [*605] *we are far from meaning to decide that such transaction could be afterwards impeached, merely because other survivors should come to a conclusion different from that on which the parties had acted. The Court would probably in such a case be much inclined as a matter of fact to believe the original, and not the subsequent estimates to be correct: per Lord Cranworth, L. J., 2 De G. Mac. & G. 63. And where a bill was filed to set aside a sale by private contract of a reversion, it was held that the highest bid for it upon a previous attempt to sell it by auction was a fair test of its market value: *Lord v. Jeffkins*, 35 Beav. 7.

But where upon the sale by private contract of a reversionary interest

in leaseholds, nothing was done except obtaining the opinion of an actuary acquainted with the local circumstances likely to influence the value, and in a suit to impeach the sale, the purchaser was unable to show that he had given the full value, the sale was set aside: *Edwards v. Burt*, 2 De G. Mac. & G. 55. And see *Edwards v. Browne*, 2 Coll. 100.

A lot purchased by private contract at an inadequate price may be set aside, although assigned by the same deed with a lot purchased by public auction: *Newton v. Hunt*, 5 Sim. 511.

The rule as to the sale of reversionary interests is not applicable to a sale of property by the reversioner and the person having the prior interest; for the rule proceeds upon the notion, that he who has only a future interest to sell does not meet a purchaser upon equal terms, but if the person having the prior interest and the reversioner concur in selling property—if, for instance, the father, tenant for life, and the son remainder-man in tail, concur together in selling estates, they form, in fact, one vendor, with a present interest, and meet a purchaser with the same advantages as if a single person had the whole power over the estates; the onus, therefore, would not lie upon the purchaser, of showing that he gave an adequate price. See *Wood v. Abrey*, 3 Madd. 422; *Wardle v. Carter*, 7 Sim. 490; *Cooke v. Burtchall*, 2 Dru. & War. 165; *Sibbering v. Earl of Balcarras*, 3 De G. & Sm. 735, 736. But there may, notwithstanding the concurrence of the tenant for life, exist other circumstances in the case which might throw the onus upon the purchaser, to show that he gave an adequate price, as in the case of a purchase by an attorney from his client, or in the case of undue parental influence having been used: *King v. Savery*, 1 Sm. & Giff. 261; *S. C.*, 5 H. L. Cas. 627. See also *Hannah v. Hodgson*, 30 Beav. 19.

Where even before 31 & 32 Vict. c. 4 came into operation, a person dealing with an heir or reversioner, showed that the transaction *was reasonable, and that a fair price had been given, either [*606] for a reversionary interest, annuity, or post-obit bond, a Court of equity would not, in the absence of fraud, set it aside: *Dews v. Brandt*, Sel. Ch. Ca. 7 *Batty v. Lloyd*, 1 Vern. 141; *Wharton v. May*, 5 Ves. 27; *Curling v. Townshend*, 19 Ves. 634; *Lord Aldborough v. Tyre*, 7 C. & F. 436.

What constitutes inadequacy of price.—There is no rule in our law as to what difference between the real value of the property and the consideration paid constitutes inadequacy of price; this the Judge must decide. By the *civil law*, a consideration which exceeded half the value of the property was adequate: *Baldwin v. Rochford*, cited 2 Ves. 517; *Nott v. Hill*, 2 Ch. Ca. 121, where Lord Nottingham says, "By the civil law a bargain of double the value shall be avoided," and wished it were so in England. See C. Lib. iv., Tit. xlv. l. 2.

As to the valuation of a reversionary interest.—When it becomes necessary to consider the value of a reversionary interest, much diffi-

culty arises from the conflicting evidence usually given—on the one hand, by auctioneers and surveyors, who estimate the value by the *market-price*; on the other, by actuaries, who generally estimate the value according to the *tables*. It is, however, now fully established, that, in calculating the value of a reversionary interest, the Court will be guided, not by the tables, but by the market price; and in the case of real estate, its nature, position, and other particulars ought to be considered as affecting the value of the interest sold. See *Hincksman v. Smith*, 3 Russ. 433; *Headon v. Rosher*, M'Cl. & Y. 89; *Potts v. Curtis*, 1 You. 543; *Newton v. Hunt*, 5 Sm. 511; *Wardle v. Carter*, 7 Sim. 490; *Ryle v. Swindells*, M'Cl. 519; *Edwards v. Browne*, 2 Coll. 100; *Davies v. Cooper*, 5 My. & Cr. 270; *Lord Aldborough v. Tyre*, 7 C. & F. 436; *Bernal v. Lord Donegal*, 3 Dow. 133; 1 Bligh., N. S., 594; *Edwards v. Burt*, 2 De G. Mac. & G. 55, 57; *Perfect v. Lane*, 3 De G. F. & Jo. 369; *Tynle v. Hodge*, 2 Hem. & Mill. 287. The contrary doctrine was supposed to have been laid down by Sir William Grant, M. R., in *Gowland v. De Faria*, 17 Ves. 20; but Lord Cottenham, in the important case of *Lord Aldborough v. Tyre*, 7 C. & F. 457, denies that such a conclusion is to be drawn from the decision of Sir William Grant. "There are two propositions, one of which was established, and the other *supposed* to be established, in that case. The one said to be established was, *that in a transaction with an expectant heir, it was necessary for the party seeking the benefit of that transaction to show *that he gave a fair price*; but that proposition [*607] has been the subject of much observation, undoubtedly, since that decision took place; and it has been considered as interfering a good deal with that proper discretion which persons who are capable, according to the law of this country, of disposing of their property ought to be at liberty to exercise. At the same time, it does establish a rule which has the effect of protecting persons who are generally speaking, very much in need of protection. Of the policy of that rule it is not my purpose to say anything; that rule has been established in the case of *Gowland v. De Faria*, and has been recognised ever since.

"But another proposition has been *supposed* to be established by that case, which is, that in transactions of this sort the Court has only to look at the value of the reversionary interest, calculated according to the tables; that is to say, how much of the value of the property is to be deducted on account of its being a postponed interest—postponed by the chance of the duration of another's life—and that that is capable of being reduced by calculation to what is considered a fair reduction with reference to the duration of the life on which it is dependent. I do not find any such proposition established by Sir William Grant, in that case. Sir William Alexander, in the case of *Headon v. Rosher*, M'Cl. & Y. 89, and Lord Lyndhurst, in the case of *Potts v. Curtis*, 1 You. 543, entertained the same opinion; and upon looking at

the language of Sir William Grant, it does appear to me that that rule is not to be extracted from it. In that case there was no evidence but that of the actuaries, and the evidence of the actuaries proved that the sum given was not the marketable value of the reversion. Sir William Grant, in observing on the case, states the evidence, before him—namely, that of the actuaries, and says there is no other evidence in the case; and he then proceeds upon that evidence, there being no other. Now the only observation I will make upon that case is, that one may suppose it would have been a more wholesome course to have adopted, seeing that the evidence was only the evidence of the actuaries, and the Court being of opinion that that was not evidence which ought to be conclusive in the case of that description between these parties, I say it would seem to have been better to have adopted some course for the purpose of ascertaining more correctly the value, in the sense in which that term is used in inquiries of that kind. Sir William Grant, however, did not adopt that course, and he decided it upon the only evidence he had, that only evidence being to the effect that an inadequate consideration had been given. It is, therefore, not an expression of opinion by Sir William Grant *that this is a rule that ought to be adopted. It is only a dealing with that [*608] case with reference to its own particular circumstances. That rule has been disapproved of by the highest authority. It was disapproved of by Sir William Alexander, in a judgment, the reasons of which are very conclusive to show the soundness of the decision at which he arrived: *Headen v. Rosher*, M'Cl. & Y. 89. It was also objected to and disapproved of by Lord Lyndhurst, in the case to which I have referred (*Potts v. Curtis*, 1 You. 543); and if your Lordships consider what the effect of that rule would be—how inapplicable it is to the great mass of cases, how little calculated it is to lead to a right conclusion, and how much it must interfere with the right of disposing of property—I am sure your Lordships will not hesitate in preferring the rule which has been established in the subsequent cases, to that which has been supposed to have been established in the case of *Gowland v. De Faria*. It is sufficient to say that the establishment of that rule would make it impossible for an expectant heir to dispose of his interest at all. That, I apprehend, is quite a sufficient objection. It is a rule also, which as a general rule, being calculated on the result of a great mass of cases, must apply with great injustice in a great variety of individual cases. The lives are supposed to be of average value, but the life in question may be an extraordinary good or an extraordinary bad one, which is likely to last beyond the usual time, or the contrary. How, then, can it be right to establish a rule not applicable to the particular case, but applying to a mass of cases collected together, and to make that rule govern an individual case, to which it may not at all apply?

“My Lords, I will not go further into my reasons for not adhering

to that supposed rule. The matter having been very fully and ably discussed by Sir William Alexander and Lord Lyndhurst, it appears unnecessary further to discuss it here than to say that I entirely concur in the reasons of those two very learned judges; and I do not think that the rule supposed to be extracted from *Gowland v. De Faria* is a rule which ought to be laid down."

The value of a reversionary interest is always to be calculated with reference to the time of the contract, and not to the result; so that, although, in the events which may have happened, a large price has been given for a reversionary interest, the Court cannot take that into consideration, if the price at the time of the contract was inadequate: *Gowland v. De Faria*, 17 Ves. 20, 25.

The circumstance that a reversionary interest forms part of the subject of a Chancery suit, must *be taken into consideration as [*609] involving a considerable deduction from the strictly calculated value of such interest (*Perfect v. Lane*, 30 Beav. 197, 3 De G. F. & Jo. 369): so must the costs of selling real estates. *Ib.*

As to the terms upon which the sale of a reversionary interest will be set aside.—Where any transaction with an expectant heir or reversioner is set aside, on the sole ground of the inadequacy of the price, the Court, proceeding upon the well known maxim "*that he who seeks equity must do equity*," will only give relief upon payment of the sum actually advanced, with interest and costs (*Twistleton v. Griffith*, 1 P. Wms. 310; *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Peacock v. Evans*, 16 Ves. 512; *Wharton v. May*, 5 Ves. 27; *Curling v. Townshend*, 19 Ves. 633; *Bowes v. Heap*, 3 V. & B. 117; *Evans v. Chesshire*, Belt's Suppl. to Ves. 312; *Fox v. Wright*, 6 Madd. 111; *Miller v. Cook*, 10 L. R. Eq. 641, 647); except the costs of an unsuccessful reference as to value (*Boothby v. Boothby*, 15 Beav. 212, 214; *Edwards v. Burt*, 2 De Gex Mac. & G. 55, 65; *Jones v. Ricketts*, 31 Beav. 130); and misconduct on the part of the purchaser of a reversionary interest will disentitle him to costs (*Baugh v. Price*, 1 Wils. 320; *Gowland v. De Faria*, 17 Ves. 20; *Moroney v. O'Dea*, 1 Ball & B. 109, and the reporter's note; *Wood v. Abrey*, 3 Madd. 417; *Bawtree v. Watson*, 3 My. & K. 339; *Tyler v. Yates*, 11 L. R. Eq. 265; so, where he has refused a larger sum for principal and interest before the suit was instituted, he will have to pay the costs of litigation which he rendered necessary: *Benyon v. Fitch*, 35 Beav. 570, 578). But compound interest will never be allowed to the purchaser: *Gowland v. De Faria*, 17 Ves. 20.

It seems that the plaintiff must pay the costs of suit so far as they relate to charges of fraud or undue pressure not proved: *St. Albyn v. Harding*, 27 Beav. 11; but see *Tyler v. Yates*, 11 L. R. Eq. 265. And as to costs see *Bromley v. Smith*, 26 Beav. 644.

Confirmation and acquiescence.—Impeachable transactions, as in *Chesterfield v. Janssen*, may be rendered valid by acts of confirmation

(*Cole v. Gibbons*, 3 P. Wms, 289); or acquiescence for a great length of time (*Sibbering v. Earl of Balcarras*, 3 De G. & Sm. 735; *Addis v. Campbell*, 4 Beav. 401; *Lord v. Jeffkins*, 35 Beav. 7), on the part of a person who is cognizant of his right to relief; for it has been well said, "that the presumption which a Court of justice most properly entertains against stale demands, can never be more properly applied than in a case where the burden of proof upon a most material point in controversy *is thrown upon the defendant" (3 De G. & Sm. 737); [*610] but confirmation or acquiescence will be of no avail whilst the reversioner continues in the same situation as when he entered into the contract, for in such cases it has always been presumed, that the same distress, which pressed him to enter into the contract, prevented him from coming to set it aside; it is only when he is relieved from that distress that he can be expected to resist the performance of the contract (*Gowland v. De Faria*, 17 Ves. 20; *Medlicott v. O'Donel*, 1 Ball & B. 156; *Kendall v. Beckett*, 2 Russ. & My. 88; *Edwards v. Browne*, 2 Coll. 100). See *Fox v. Mackreth*, ante, 146, and note, 175; and in *Curwyn v. Milner*, 3 P. Wms. 292, n., relief was given even after payment of the money due on a post-obit bond, the payment having been made from fear of an execution.

Where a transaction is not merely voidable or impeachable, but is absolutely void, upon principles of public policy, then, as is laid down by Lord Hardwicke in the principal case, it is incapable of confirmation. Thus, a usurious contract was, and a marriage brokerage contract still is, void ab initio, and does not admit of confirmation: *Shirley v. Martin*, 3 P. Wms. 74, n.; *Cole v. Gibson*, 1 Ves. 506, 507.

"There is no case where mere inadequacy of price, independent of other circumstances," said Chancellor Kent, in *Osgood v. Franklin*, 2 Johnson's Chancery, 1, 23, "has been held sufficient to set aside a sale made between parties standing on equal ground, and dealing with each other without any imposition or oppression. And the inequality amounting to fraud, must be so strong and manifest as to stock the conscience and confound the judgment of any man of common sense. The doctrine is settled, that in setting aside contracts, on account of inadequate

consideration, the ground is fraud arising from gross inequality. Unless the inadequacy does, of itself, *ex evidentia rerum*, prove fraud, the rule is, says Ch. B. Macdonald, (1 Wightwick, 109,) that inadequacy, by itself, has not the weight suggested. If, indeed, advantage be taken, on either side, of the ignorance or distress of the other, it affords a new and distinct ground, and a very great inadequacy may form a presumption of oppression. Dealing with younger heirs, and for reversionary interests, is also watched with the utmost jealousy, and constitutes a particular class

of cases, forming another exception to the general rule, that for mere inadequacy of price a contract is not to be set aside. So, leases of charity estates will be set aside for an undervalue, if considerable, though there be no imputation of fraud, on grounds peculiar to that trust." See also *Juzan et al. v. Toulmin*, 9 Alabama, 663, 686; *Warner v. Daniels et al.*, 1 Woodbury & Minot, 92, 102, 103, 110. The peculiar principle that the sale of a reversion by a young heir, for a very inadequate price, will be set aside in Chancery, without evidence of fraud, is recognised by Catron, J., in *Jenkins et al. v. Pye et al.*, 12 Peters, 241, 257, where the English cases are reviewed. "That such purchase," he remarks, "is a *constructive* fraud, and the purchaser compelled to account and give up his bargain, if found to be advantageous, has not, for a century, been an open question. The conveyance is treated as a mortgage, and the grantor relieved on payment of the principal advanced and interest, without inquiry whether there was a fraud or imposition: *Davidson v. Little*, 10 Harris, 245, 252.

It is a well established principle in courts of equity in this country, that a conveyance or contract will be set aside, wherever it has been obtained through undue influence over a person greatly under the power of another, if there is inadequacy of price, or clear ground of inference that a confidence reposed has been abused, or advantage has been taken of

incompetency, weakness of understanding, or clouded or enfeebled faculties: *Wheeler v. Smith et al.*, 9 Howard's S. Ct. 55, 82; *Whelan v. Whelan*, 3 Cowen, 539, 572; *M'Craw v. Davis*, 2 Iredell's Equity, 618; *Hunt v. Moore*, 2 Barr, 105; *Slocum and Wife v. Marshall et al.*, 2 Washington, C. C. 397; *Kennedy's Heirs and Executors v. Kennedy's Heirs*, 2 Alabama, 574, 606, post vol. 3, c. See the principles applicable to this subject, examined in *Taylor v. Taylor et al.*, 8 Howard's S. Ct. 183. "If deeds are obtained," said Marshall, C. J., in *Harding v. Handy*, 11 Wheaton, 104, 125, "by the exercise of undue influence over a man whose mind has ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from him. It is the peculiar province of a court of conscience, to set them aside. That a court of equity will interpose in such a case, is among its best settled principles." See vol. 2, part 2, note to *Huguenin v. Baseley*. The general principle stated in *Chesterfield v. Janssen*, that equity will give relief against presumptive frauds, and therein will go further than courts of law, where fraud must be proved and not presumed only, has been repeatedly recognized in this country; *Butler et al. v. Haskell*, 4 Dessausure, 652, 684; *Warner v. Daniels et al.*, 1 Woodbury & Minot, 92, 103; *Lester v. Mahan*, 25 Alabama, 445. "The distinction between legal and equitable jurisdiction upon fraud is this,"

said Woodworth, J., in delivering the opinion of the court in *Jackson v. King*, 4 Cowen, 207, 220, "that at law it must be proved, not presumed; so that equitable jurisdiction may be exercised upon an instrument unduly obtained, when a court of law could not enter into the question, (18 Ves. 483.) In *Butcher v. Butcher*, (1 V. & Beames, 98,) Lord Eldon observes, that some judges have said, that a deed cannot be fraudulent, unless it be fraudulent both in law and equity; but to that doctrine he could not agree, though a strong inclination had been evident to say, whatever is equity ought to be law, an opinion acted upon by Mr. Justice Buller, who had persuaded Lord Mansfield to act upon it, until it was reformed by Lord Kenyon, with the assistance of the same judge; yet the clear doctrine of Lord Hardwicke and all his predecessors was, that there are many instances of fraud that would affect instruments in equity, of which the law could not take notice. The broad ground assumed by Lord Mansfield (1 Burr. 396) is, that courts of equity and courts of law have a concurrent jurisdiction to suppress and relieve against fraud. This doctrine has, however, been subsequently qualified, according to the distinction taken by Lord Eldon, and is founded in good sense. I am not aware of any express adjudication in our courts. But in 4 Dessausure, Ch. Rep. 684, it is sanctioned. It was there held, that fraud may be presumed in equity, but must be proved at law.

In accordance with these principles, a variety of cases have been decided, and relief afforded in equity, where, from the nature of the transaction, and the situation of the parties, fraud and imposition might be presumed. (3 P. Wms. 129, Powell on Con. 31.) So, also, in *Chesterfield v. Janssen*, (2 Vesey, 155,) Lord Hardwicke describes one species of fraud, that may be presumed from the circumstances and condition of the parties contracting. And this, he says, goes further than the rule of law, which is, that fraud must be proved, not presumed. Inadequacy of consideration is also a badge of fraud, or a fact connected with other circumstances from which fraud may be inferred, (1 Bro. Ch. Cas. 1.) So, also, a conveyance, obtained from persons uninformed of their rights, will be set aside, though no actual fraud be proved, (2 Id. 150.) In these and many other cases that might be cited, equity considers the instruments as obtained fraudulently from the circumstances and relation of the parties, although no actual fraud is proved. Yet, in none of these cases has it been decided that a court of law would declare the instrument void." "Fraud," said Savage, C. J., in the Court of Errors, on an appeal from Chancery, in *Hall v. Perkins*, 3 Wendell, 626, 631, "is often the subject of inquiry in a court of law as well as in equity; there is this difference, however, that at law fraud must be proved; it must be what Lord Hardwicke calls *dolus malus*, actual fraud arising

from facts and circumstances of imposition. At law, the contract of every man who is *compos mentis*, is binding, and cannot be avoided in general without proof of actual fraud in obtaining it. Neither will a court of equity measure the extent of men's understandings, and say that there is an equitable incapacity where there is a legal capacity; yet if a weak man gives a bond for a pretended consideration, when in truth there was none, or not near so much as is pretended, equity will relieve against it, (3 P. W. 130, 131.) Fraud is sometimes also apparent from the intrinsic nature of the contract. It may be such as no man in his senses and not under delusion would make, and such as no honest, fair man would accept, which is Lord Hardwicke's second class of frauds; and his third is that which may be presumed from the circumstances and condition of the parties contracting, (2 Vesey, Sen. 155, 156.)" The case before the court in *Hall v. Perkins*, was pronounced to be that of "a contract which no sensible man not under delusion would make on the one hand, and which no man who had not lost all consciousness of shame would accept on the other. One of the parties was a weak boy, the other a man of capacity, who may be presumed from the circumstances of this case, an artful intriguer in small matters. It was a contract made by an unsuspecting youth with a man in whom, from the connection existing between them, he must have

reposed confidence, and to whom he naturally looked for advice and protection. It is clearly a case, therefore, where from the nature of the transaction and the situation of the parties, fraud and imposition are to be presumed." See *Conant v. Jackson*, 16 Verm. 335, 349, where the same principles were laid down and applied by the Supreme Court of Vermont.

[It would seem to be well settled in this country, in accordance with the decisions in England, that the sale of an expectancy by an heir, in the lifetime of the ancestor, is contrary to the policy of the law, and void; *Boyton v. Hubbard*, 7 Mass. 112; *Bowry v. Spear*, 7 Bush. 451; *The Poor v. Hazleton*, 15 New Hampshire, 564; unless sanctioned by the ancestor and upheld by an adequate consideration; *Fitch v. Fitch*, 8 Pick. 480; *Trull v. Eastman*, 3 Metcalf, 121; *Nimmo v. Davis*, 7 Texas, 266; *Davidson v. Little*, 10 Harris, 245, 252; *Powers' Appeal*, 13 P. F. Smith, 443; when the transfer may not only be valid; *Fitzgerald v. Vistal*, 4 Sneed, 258; but will, if effected by a deed with warranty, bind and pass the title by estoppel, in many of the states of this country, on its subsequent descent to the heir; *Fitch v. Fitch*; *Trull v. Eastman*, 2 Smith's Leading Cases, 637, 7th Am. ed.; but this is an innovation on the common law, and the appropriate remedy is in chancery, which may enforce the grant, as if fair and adequate; *Chew v. Bar-net*, 11 S. & R.; *Mastin v. Marlow*, 45 North Carolina, 695.

To contract with an heir for what he may subsequently receive from an ancestor, or from any one from whom he has an expectancy, without the knowledge of the latter, was said, in *Boynton v. Hubbard*, to be a fraud on the ancestor if not on the heir, and to belong to a class of transactions which the courts set aside as contrary to public policy, without inquiring whether the purchaser took advantage of the necessities of the vendor. But this rule is confined to the sale of expectancies; and does not extend to estates in remainder or reversion, where there can be no fraud on third persons if the sale is fair as between the parties; and in *Cribbins v. Markwood*, 13 Grattan, 495, the Court refused to inquire into the adequacy of the consideration for the grant of a reversion, which had been made by a young man just after attaining his majority, without the knowledge of his mother, who had a life estate in the property, there being no evidence of actual fraud or undue influence. It was said in like manner in *Davidson v. Little*, that one who has a vested or contingent interest in real or personal property, which will take effect in possession on the death of an ancestor who has the life estate, may dispose of it as he thinks proper, without consulting the ancestor. On the other hand, in *Nimmo v. Davis*, 7 Texas, 260, the burden of showing the adequacy and fairness of the consideration for such transfers, was said to rest on the purchaser; and a similar opinion

was expressed in *The Poor v. Hazleton*, 15 New Hampshire, 564. And there can be little doubt that chancery may intervene whenever the inadequacy of price, and the other circumstances of the case, are such as to warrant the belief that the vendee took undue advantage of distress or weakness, whether the subject-matter of the sale be a reversionary interest or one in possession; *Dunn v. Chambers*, 4 Barbour, 376; *post*, vol. 2, note to *Huguenin v. Baseley*.

It was held in *Needles v. Needles*, 7 Ohio, N. S. 432, 443, that a contract between a father and son, by which the latter agreed to resign all claim on the estate of the former, after his death, in consideration of an advancement made at the time, was invalid, and would not debar the son from recovering in opposition to its terms after the death of the father. But this case would probably not be followed in the other states of the Union, and is in opposition to the current of decision in England. An advancement may give birth to an equity independently of contract; and certainly, when a contract is superadded to it; and there would seem to be no reason why an agreement by a son to resign all future claim on the estate of his father, in consideration of an immediate benefit, should not be received with the favor which has been invariably shown by chancery, to agreements between the members of a family, for the disposition or settlement of property in which they have a present or prospective interest. See *post*,

vol. 2, notes to *Stapilton v. Stapilton* and *Row v. Dawson*.

The question whether a contract vitiated by fraud, can be confirmed, has been variously considered. It is well settled, that a purchase by a trustee, at his own sale, is voidable, not void, and may be ratified by the *cestui que trusts*. It is their privilege to determine whether it shall stand or fall, although the choice, once made, is irrevocable; *Painter v. Henderson*, 7 Barr, 48, 50; *Michaud v. Girod*, 4 Howard, 504. Although a contract between a guardian and a ward, who has just come of age, will be set aside as constructively fraudulent, unless it is in all respects just, fair and equal, as it regards the ward, it may be confirmed by him after the tutelage has ceased, and all suspicion of undue influence is at an end.

So an heir, who has come into the possession of his estate, and is in a position to think and act deliberately, may waive the right to set aside a contract made under the pressure of want. The principle is analogous to that which entitles the man of full age to adopt and ratify the acts of the infant. To make such a ratification valid, it must take place when the party is free from pressure, and with full knowledge that the transaction is impeachable, and might be set aside, *ante*, 825. It was, moreover, held, in *Duncan v. McCullough*, 4 S. & R. 485, that a ratification would not be inferred from a casual declaration not made to the opposite party, nor intended to

reach him and influence his conduct.

It seems to have been thought at one period, that a contract invalidated by actual fraud could not be confirmed by the most explicit ratification, or even by acting under it, or accepting the benefit which it confers; *Jackson v. Somerville*, 1 Harris, 339; *Duncan v. M'Cullough*; *Chamberlain M'Clurg*, 8 W. & S. 31. In *McCoskey v. Graeff*, 11 Harris, 321, the distinction was said to be between actual and constructive fraud. An attorney, who bought the title which he was employed to investigate, might hold it until he was reimbursed; *Cleavinger v. Reimar*, 3 W. & S. 486; and so when a conveyance was procured through undue influence; *Lowther v. Condon*, 2 Atk. 133; *Sanderson v. Glass*, *Ib.* 296; or when advantage was taken of the grantor's age or imbecility, to obtain the property for less than it is worth; *Harding v. Handy*, 11 Wheat. 103. A conveyance procured by actual fraud, was, however, merely void, and the injured party might maintain an ejectment without refunding or tendering the price. The same doctrine may be found in *Miller's Appeal*, 6 Casey, 478; *Gilbert v. Hoffman*, 2 Watts, 6; and *Riddle v. Murphy*, 7 S. & R. 230.

These decisions overlook the distinction between the right of rescission, which the injured party may waive or enforce at pleasure, and the right to damages, which cannot be extinguished without

satisfaction or a release. See *Pearson v. Chapin*, 8 Wright, 9; *Negley v. Lindsay*, 17 P. F. Smith, 226; *Morrow v. Rees*, 19 Id. 368; *Seylar v. Carson*, Ib. 81. An illegal contract is necessarily void and insusceptible of ratification; but it is for him who has been misled by artifice or misrepresentation, to say whether he will repudiate or enforce the contract. A purchaser who has been induced to buy by fraud, obviously cannot accept and retain the property without paying what it is worth as between himself and the vendor, which is the price less the difference between what it was represented as being, and what it really is. See *Beetem v. Burkholder*, 19 P. F. Smith, 249; *Summers v. Ritchie*, 6 Casey, 147; note, 1 Smith's Lead. Cases, 355, 7 ed. "That a man should retain the property which he purchased," and at the same time recover from the seller the whole amount of the purchase-money—that he should be permitted both to affirm and annul the sale—is contrary to reason, to justice and to the authorities which have been produced on the argument; *Summers v. Ritchie*.

It is, moreover, settled, that the choice to ratify or annul must be made immediately on the discovery of the fraud, or at all events, while it is still practicable to restore things to their original condition; and that a contract which has been confirmed with a full knowledge of the circumstances, cannot afterwards be set aside; *Beetem v. Burkholder*; *Seylar v. Carson*; *Clarke v. Dickson*, 1 E. B. & E. 148;

Downer v. Smith, 32 Vermont, 1; *Clark v. Newville*, 46 Georgia, 261. See *Kinney v. Kurnen*, 49 New York, 64.

By an exception to the rule, "if the thing, the consideration of which is sought to be recovered back, be entirely worthless, there is no duty to return it; *Babcock v. Case*, 11 P. F. Smith, 427. The soundness of that determination cannot be questioned: *Lex neminem cogit ad vana seu inutilia*. This may sometimes be—as it was in that case—a mere question of law. What had been sold the law adjudged to be utterly worthless; a tax title, and a sale of seated land as unseated. It would have been a waste of time, labor and paper to have reconveyed it, and a mere idle ceremony to have tendered a deed. The same law would hold when forged bank notes or other counterfeit securities are the subject-matter of the contract. No honest use could be made of them by the vendor, and they need not therefore be returned or tendered. Ordinarily, however, it is a question of fact for the jury, as where, under circumstances entitling the vendor to rescind, shares of stock have been sold in a company entirely insolvent, or which has become insolvent, and the shares valueless in point of fact before suit. If the shares of the Glenville Coal Company, which are the subject of the sale in this case, were of no value when the contract was rescinded and the suit brought, and the jury had so found, the principle of *Babcock v. Case*, would have applied;" *Beetem v.*

Burkholder, 19 P. F. Smith, 249, 254.

The rule was accurately stated in *Pearsoll v. Chapin*, 8 Wright 9, where C. J. Lowrie said, that to allow a man who had been induced to part with his property by a fraudulent misstatement to recover it back, without refunding the price, would be to correct fraud by injustice, and render a readiness to be duped a profitable art. A contract which was fraudulent as distinguished from one forbidden by legal policy, might always be confirmed by the injured party. If a purchaser who had been induced to buy by deceit, elected to keep the property, he could only do so on the terms of paying the consideration, subject to a reasonable abatement; and if he sought to compel the vendor to refund the consideration, the property must be tendered or returned before action brought. In like manner, if the injured party brought an action of deceit for damages, he would affirm the sale; *Jenkins v. Simpson*, 14 Maine, 364; *Whitney v. Allaire*, 4 Denio, 554. But a contract which was fraudulent as against a third person, could not be ratified by the guilty parties, because that would be to enable them to condone their own offence.

It results from what is here said, that where a bill is filed to set aside a conveyance as a fraud on creditors, the grantee cannot ask that his advances to the grantor shall be repaid, or that the deed shall stand as security for the liabilities which he has incurred on his account. Under these circum-

stances, the creditors are strangers to the transaction, and cannot be under a moral or legal obligation to refund money which they did not receive; *Sands v. Codwise*, 4 Johnson, 598. So a lender who advances money to an agent in fraud of his principal, on a security belonging to the latter, cannot insist on reimbursement as a condition of surrendering the security; *Smith v. Loader*, Prec. in Chan. 80. And it has been held in Pennsylvania, that where a man buys at an under-value at a sheriff's sale, through a fraudulent combination to deter bidders, the defendant in the execution may maintain ejectment, without refunding the amount paid to the sheriff, because the consideration does not move to him, and he is consequently not put to an election between it and an affirmance of the fraudulent transaction; *Riddle v. Murphy*, 7 S. & R. 230; *Gilbert v. Hoffman*, 2 Watts, 66; *M'Coskey v. Graeff*, 11 Harris, 321. These decisions are not authorities for the proposition that a fraudulent contract will not be ratified by accepting a benefit under it, with a full knowledge of the deceit; *Pier-oll v. Chapin*; *Beetem v. Buckholder*, 19 P. F. Smith, 249, 253.

It is necessary to discriminate between principles which are essentially different. The right to compensation for an injury of any kind cannot be waived by an accord without satisfaction, and *a fortiori* not by a naked parol declaration of an intention to forgive. But one who has been defrauded may seek redress in either of two ways. He

may affirm the contract and recover damages for the injury resulting from the deceit, or he may return what he has received and require the guilty party to make restitution. And as these remedies are to some extent irreconcilable, the person who has received the injury must elect between them, and the choice when made will be irrevocable.

The principles which apply in such cases were stated with great clearness in *Whitney v. Allaire*, 1 Hill, 184 ; 4 Denio, 554 ; 1 Comstock, 306, where the question arose on a fraudulent representation in making a lease, under which the plaintiff had come into possession with a knowledge of the fraud. "Certainly," said Cowen, J., "the jury might well have been instructed in the present case, that Allaire had made the lease good by election ; that he had waived the right to consider it a nullity. That, however, is a very different matter from a waiver of the cause of action or recoupment. When a man is drawn into a contract of sale or demise by fraud, a right of action attaches immediately, as much so as if it had been committed against him ; and though he may affirm the transfer of the interest and take the property, yet waiver is no more predicable of the cause of action, than where a man receives a delivery of goods which have been tortiously taken from him. The vendor or lessor was a wrong doer when he committed the fraud ; and no act of the injured party short of a release or satisfaction will bar the remedy,

thought it might mitigate the amount of damage."

The subject is elucidated by the following remarks of Sharswood, J., in *Negley v. Lindsay*, 17 P. F. Smith, 226 : "One defence set up was that the plaintiff had been guilty of fraudulent misrepresentations as to the character and value of the land which was the subject matter of the contract of sale. There was evidence that Gen. Negley, one of the defendants, after the contract had been made and signed, as agent, and on behalf of the others, had visited and examined the property. The learned judge held, and so instructed the jury, that if they found this to be so, and that Gen. Negley became acquainted, or had the opportunity of becoming acquainted, with the true state of the facts, the defendants were bound to give notice to the plaintiff, within a reasonable time, of their rescission of the contract ; and if they waited until after they had attempted and failed to get up an oil company to take the land, they could not avail themselves of this defence."

"It was decided in *Duncan v. M'Cullough*, 4 S. & R. 487, that when a contract is in itself fraudulent, it is void, and cannot be confirmed by any subsequent declarations or acts by which its fairness is acknowledged. "Where there has been actual and positive fraud, or the adverse party has acted *mala fide*, there can be no such thing as a confirmation ; what was once a fraud will always be so. The reason of the distinction is,

that a contract infected with that kind of fraud, which must be proved, and not presumed from the circumstances of the parties, is not merely voidable but void; and confirmation without a new consideration would be *nudum pactum*." This decision was recognized and affirmed in *Chamberlain v. M'Clurg*, 8 W. & S. 31; *Goepp's Appeal*, 3 Harris, 428; *Miller's Appeal*, 6 Casey, 478."

"The authorities cited by Mr. Justice Gibson in *Duncan v. M'Cullough*, of *Ardglass v. Munbaugh*, 1 Vern. 237, and *Wiseman v. Beake*, 2 Vern. 121, are those of young heirs dealing with their expectancies, "catching bargains," where the contract has been held void on the ground of public policy; and, as is remarked by Mr. Justice Story (1 Eq. Jur. § 337), "the aim of the rule is chiefly directed to prevent deceit and imposition upon parents and other creditors." Of these cases, Lord Hardwicke remarks, the same fraud attended the confirmation as the original bargain. *Baugh v. Price*, 1 Wilson, 320, was a case of the same kind, and it is there expressly put on the ground that the contract was void as against public policy."

"Where a contract is void on the ground of public policy, or against a statute, as the usury law, there is every reason to hold the confirmation affected with the original taint; *Shelton v. Marshall*, 16 Texas, 344. Certain it is, that the doctrine that a contract, void on account of fraud practiced on the party, is incapable of confirmation,

is not the generally received doctrine of the elementary writers; 1 Story's Eq. Jur. 345; Addison on Contracts, 273; 1 Sugden on Vendors, 276; 2 Parsons on Contracts, 780. But however this may be, we must now consider *Duncan v. M'Cullough*, as overruled by *Pearsoll v. Chapin*, 8 Wright, 9, in which it was expressly decided, that a contract tainted with fraud, may be confirmed or ratified without a new contract founded on a new consideration. It is there said, that he who knowingly accepts and retains any benefit under such a contract, or who uses the property acquired as his own, after the discovery of the fraud, or who does any positive act forgiving the fraud, or unduly delays claiming back his property, or giving up what he received, affirms the validity of the contract; and decisions in the courts of our sister States are cited in support of these instances, to which may be added *James v. Emery*, 40 N. Hamp. 348; *Mason v. Bovet*, 1 Denio, 69; *The Mattiawan Co. v. Bentley*, 13 Barbour, 641; *Wheaton v. Baker*, 14 Id. 594."

"These principles are only a recurrence to those advanced by Lord Chancellor Hardwicke in *Chesterfield v. Janssen*, 2 Ves. 125; 1 Atk. 354, the result of which is, that if the original contract be illegal, or usurious, no subsequent agreement or confirmation of the party, can give it validity. But if it be merely against conscience, then, if the party being fully informed of all the circumstances of it, and of the

objections to it, in his own words, "with his eyes open," voluntarily confirms it, he thereby bars himself of that relief which he might otherwise have had in equity; 1 Fonblanque's Eq., b. 1, ch. 2, s. 13, n., *ante*.

It was held in *Bassett v. Brown*, 105, Mass., that whether an agent acquires property through a constructive fraud upon his principal, or misleads the latter by a misrepresentation of the nature and value of the consideration, the grant is voidable only, and not void. The title passes according to the terms of the deed, subject to the grantor's right to defeat it.

"The demandant was entitled, upon discovering the facts, to elect whether to affirm the conveyance and retain the consideration, or to avoid it. If he would do the latter, he must return the consideration, or whatever property he may have received, in exchange for that which he conveyed; *Thayer v. Turner*, 8 Metcalf, 550. He must do it, or at least signify his election, within a reasonable time; otherwise, his continued silence, after knowledge of the facts which entitle him to disaffirm, will be construed as an election to affirm, or an affirmation by acquiescence. Chit. Con., 10 Am. ed. 489, 815; *Kimball v. Cunningham*, 4 Mass. 502; *Copeland v. Mercantile Ins. Co.*, 6 Pick. 198; *Perley v. Batch*, 23 Pick. 288. Per Buller, J., in *Towers v. Barrett*, 1 T. & R. 136; *Norton v. Young*, 3 Greenleaf, 30. If, after such knowledge, he continues to deal with the property as his own, he thereby affirms the

contract by which he received it; 2 Kent. Com., 6th ed. 613; Story, on Sales, §§ 420, 446; *Hoffman v. Noble*, 6 Metc. 68; *Leonard v. Morgan*, 6 Gray, 412; *Campbell v. Fleming*, 1 Ad. & Ellis, 40; *Whitney v. Allaire*, 4 Denio, 554. Whether the act of avoidance is within reasonable time is a question of law, to be decided by the court upon all the circumstances of the case, unless something equivocal in those circumstances, or material facts in dispute, require a submission to the jury with instructions; *Holbrook v. Burk*, 22 Pick. 546, 555; *Haskins v. Hamilton Ins. Co.*, 5 Gray, 432, 438; *Kingley v. Wallis*, 14 Maine, 57; *Pratt v. Farrar*, 10 Allen, 519."

One who is induced to purchase real estate by a fraudulent representation, may reconvey, and recover back the purchase-money in assumpsit for money had and received, or he may keep the property, and maintain an action on the case for the deceit. But the right of rescission is *summi juris*, and must be exercised immediately on the discovery of the fraud, or before it is too late to restore things to their original condition.

The rule that a fraudulent contract cannot be set aside, without returning or tendering the consideration, does not apply to third persons, who have received nothing under the contract. It was accordingly held in *Sands v. Codwise*, 4 Johnson, 536, 571, that when a deed fraudulent as against creditors, is set aside at their instance, the grantee is not entitled to compensation for the advances which he has made to the grantor, or for

his use. See *M'Coskey v. Graff*, 11 Harris, 321, 326. The rule is a severe one, and would hardly apply to money laid out in the payment of taxes, or such repairs as are essential to exclude the elements or prevent waste.

It is accordingly well settled, that where a deed is obtained under circumstances, which though falling short of actual fraud, afford grounds for the intervention of a chancellor, he may order it to stand as a security for the sum actually due, and that the grantee shall reconvey when that is paid; *Boyd v. Dunlap*, 1 Johnson, Ch. 475. In *Boyd v. Dunlap*, a son who was insolvent, made a deed to his father, in satisfaction of a debt which was much less than the value of the property conveyed. A creditor of the son obtained judgment, issued an execution, and bought the premises at the sheriff's sale. He subsequently filed a bill against the father for discovery and relief, which was afforded by a decree that the complainant should execute a conveyance to the defendant, on receiving the amount of his judgment, or that the defendant should convey, on being paid the amount actually due by the son. This marks the distinction between equity and law; for if the complainant had brought an ejectment instead of applying to a court of equity, the verdict must have been absolute for him or for the defendant. Chancellor Kent said, that a court of law could not take a middle course. It must either sustain the deed, or declare it void for all purposes. A chancellor might dis-

criminate, and while rejecting what was invalid, mould the transaction into such a shape as would serve the ends of justice. In like manner, where the complainant alleged that he had been induced to transfer stock while in a state of mental and physical weakness, arising from ill-health, in payment of an account which was greatly overcharged, the court directed the stock to be returned on his paying what should prove to be due on a fair statement and settlement of the account; *Williams v. The Savage Man. Co.*, 1 Maryland, Ch. 306, 3 Id. 420.

It is well settled in general, that a constructive trust will not be enforced without reimbursing the defendant for money actually laid out, and which has inured to the complainant's benefit, *ante*, notes to *Fox v. Mackreth*. A purchase at sheriff's sale in fraud of an agreement with the defendant in the execution to protect his interest, is held in Pennsylvania to be an exception to this principle; and a recovery may be had in an equitable ejectment against the purchaser, without tendering or returning the amount paid by him as the consideration for the sheriff's deed; *Seylar v. Carson*, 19 P. F. Smith; *Smull v. Jones*, 1 W. & S. 128, 130. The principle as laid down in *Smull v. Jones*, is broad enough to include every case of a trust, *ex maleficio*, or where title is obtained by fraud. But this course of decision is contrary to the rule that he who seeks equity must do it, and may be thought to stand in need of reconsideration.

*MARSH v. LEE.

[*611]

TERMINO SANCTAE TRINITATIS, ANNO 22, CAR. 2.

REPORTED 2 VENTRIS, 337.

TACKING INCUMBRANCES.]—*If a third mortgagee having advanced his money without notice of a second mortgage, afterwards buy in a first mortgage or statute, though it be pendente lite, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee, having obtained the first mortgage or statute, and having the law on his side, and equal equity, he shall thereby squeeze out and gain priority over the second mortgagee.*

A bill in Chancery was brought by Marsh, and an answer put in thereto.

The case was thus:—One English, being seised of the manor of Wicksall and of the manor of Monfield, in 1649, mortgages part of the manor of Wicksall to Burrell for 1000*l*. Afterwards in 1655, he acknowledges a statute to Burrell of 800*l*., for the payment of 400*l*.

Afterwards, in 1662, English mortgages both these manors to Mrs. Duppa, for 7000*l*.

Afterwards in 1665, English mortgages the manor of Wicksall to Lee, for 2000*l*.; Lee *having no notice of the former mortgages.*

[²After Mrs. Duppa's death, her executors brought actions of ejectment against English, and filed their bill of foreclosure against him. In Michaelmas Term, 1667, English suffered judgment in ejectment against him at the suit of the executors, with a cesset executio until May, 1668. The cesset executio having expired, English obtained an injunction against the proceedings at law, upon the judgment in ejectment, until hearing or another ^{*}order; and on the 5th of June, 1668, a decree was made, [*612] that English should redeem within a twelvemonth, or be foreclosed. On the 26th of November, 1668, the Master reported, that 8530*l*. 14*s*. would be payable to the plaintiffs on the 6th of June, 1669.

On the 27th of November, 1668, Lee, by the advice of counsel, purchases in the two incumbrances to Burrell, viz. the mortgage of part of the manor of Wicksall, and the statute.

On the 5th of February, 1669, the Master's report was confirmed. And now Marsh, executor of Duppa, sues Lee, who pleads this whole matter.

My Lord Keeper, Sir Orlando Bridgeman, assisted by Hale, Chief Baron, and Justice Rainsford, held, that Lee might make

¹ *S. C.*, 1 Ch. Ca. 162. 8 Ch. Rep. 63.

² This statement within brackets is drawn up from 1 Ch. Ca. 162, where the proceedings in the case are fully given.

use of these incumbrances to protect his own mortgage. For they said, that *he had both law and equity for him*.

First, he had law; for that he had a precedent mortgage in 1649 (which, indeed, was but upon part), and also the statute in 1655; so, that, while these remained in force, Marsh could not come in.

Next, he had equity; for he having a subsequent mortgage, yet it *being without notice*, he ought to be relieved in this Court. And, therefore, my Lord Chief Baron put the case, as if the first mortgage had been of the manor of Wicksall to Burrell, and afterwards it had been mortgaged to Duppa, and afterwards to Lee, *not having notice*; if afterwards Lee bought in Burrell's mortgage, he shall hold the estate against Duppa, until he be satisfied for both the money which he paid Burrell, and also his own money lent upon the last mortgage: and for that he said, that it had been so adjudged in *Camerâ Scaccarii*, in the Court of equity, since the King came in, in one *Shelley's case*.

Next, he put the case of the statute, which English entered in to Burrell, in 1655, and was afterwards bought by Lee from Burrell. He held, that Duppa shall not bring Lee to any account upon this statute here in equity, any otherwise than he may do at common law.

[*613] **Nota.* It was agreed that the lands were extended upon the statute at the third part of the true value. Now, at common law, the conusor, or he that claims under him, must bring a *scire facias ad computand*, as in the 4 Co. 69 b. But then the conusee shall not account according to the true value, but according to the extended value, and also for the whole statute: and if the conusee is satisfied by the extended value, the conusor shall recover; or if the conusor will pay down the rest of the money which is behind, with damages, he shall also recover. But if the conusor will sue the conusee in a court of equity, then he shall bring him to account for what he hath received of the profits above the extended value.

Now then our case here is somewhat more, for Lee has also equity on his side, and therefore Duppa shall not bring him to account for what he has received above the extended value, unless he has also received enough to satisfy his own mortgage of 2000*l.*, as well as the statute; and therefore, if Marsh will take off this statute by a suit in this Court, he must be content that Lee doth account upon the extended value for the whole 800*l.* and damages.

Secondly, they held, that whereas part of the manor of Wicksall was mortgaged to Burrell, but that now the whole manor was mortgaged to Lee, that yet the first mortgage should not extend to protect more than that part of the manor which was first mortgaged to Burrell.

And my Lord Chief Baron Hale put the case thus:—If a man is seised of sixty acres, and mortgages twenty to A., and then

mortgages the whole to B., and then mortgages the whole to C., and afterwards C. purchases in the first mortgage, that shall not protect more than the twenty acres; but it shall protect those twenty acres so as B. shall never recover that, until he pay C. all the money upon the first and last mortgage.

But Hale said, that he thought that in this case, inasmuch as the mortgage to Lee¹ was only of part of Wicksall, that therefore Marsh might bring Lee to an *account upon the extended value, whereupon these two manors were extended upon [*614] the statute; and if Lee had received the money due upon the statute, by receiving of the profits according to the extended value, or if she will pay down the residue of the money due upon the statute, or if she will pay down so much as the proportion will come to for Monfield, that then she may discharge the manor of Monfield.

But then my Lord Keeper asked him how he would have it appointed,² and how much should be laid upon Monfield, and how much upon Wicksall? for that part of Wicksall is under that extent.

To which Hale answered, that if Marsh did sue Lee for the discharge of this statute from Monfield, that Monfield should be discharged by her paying down as much as the proportion comes to, or when Lee shall have received so much according to the extended value, and that he thought there might be a proportion found out by the Court.

Nota. Sir H. Finch,³ counsel for Lee, cited *Primate and Jackson's case*,⁴ *Grove and Grove's case*,⁵ and *Mrs. Calamy's case*.⁶ all which were resolved in this Court—That a purchaser or mortgagee coming in upon a valuable consideration, without notice, and purchasing in a precedent incumbrance, it shall protect his estate against any person that hath a mortgage subsequent to the first, though before the last mortgage, though he purchased in the incumbrance after he had notice of the second mortgage.

Marsh v. Lee, the pleadings of which are fully stated in 1 Chancery Cases, 162, lays down the doctrine, never since allowed by the judges to be questioned, that a mortgagee, without notice, purchasing the first incumbrance, shall thereby protect his estate against any person having a mortgage subsequent to the first incumbrance, though he purchased in the incumbrance after he had notice of the subsequent mortgage. In *Edmunds v. Povey*, 1 Vern. 187, there were first, second, and third mortgagees, who had all lent *their money without notice. The third mortgagee, hearing of the two former securities, bought [*615]

¹ That is to say the mortgage which Lee took as assignee of *Burrell*.

² Qy. "Apportioned."

³ Afterwards Earl of Nottingham.

⁴ *Hardres Rep. nom. Hedworth v. Primate*.

⁵ *Churchill v. Grove*, Nels. Rep. 89, 1 Ch. Ca. 35.

⁶ *Higgon v. Syddall, Calamy, and Others*, 1 Ch. Ca. 149.

in the first incumbrance, a judgment that was satisfied; it was strongly insisted at the bar, that, though the trade of buying in incumbrances had been formerly countenanced, yet that it was in truth a thing against conscience, and contradictory to many established rules of law and equity. But, after long debate, the Lord Keeper North told them, he wondered the counsel laid their shoulders to a point that had been so long since settled, and received as the constant course in Chancery. "It is true," said his Lordship, "there have been strong arguments used against the unreasonableness of this practice, and there might be likewise strong reasons brought for the maintaining of it, and so it was at first a case very disputable; but being once solemnly settled, as it was in the case of *Marsh v. Lee*, he would not now suffer that point to be stirred." See also *Holt v. Mill*, 2 Vern. 280. In *Wortley v. Birkhead* (2 Ves. 571), Lord Hardwicke fully approves of the principal case, and thus explains the foundation of the doctrine it establishes. "As to the equity of this court," observes his Lordship, "that a third incumbrancer having taken his security or mortgage without notice of the second incumbrance, and then being puisne taking in the first incumbrance, shall squeeze out and have satisfaction before the second, that equity is certainly established in general, and was so in *Marsh v. Lee*, by a very solemn determination by Lord Hale, who gave it the term of the 'creditor's tabula in naufragio;' that is, the leading case. Perhaps it might be going a good way at first; but it has been followed ever since, and, I believe, was rightly settled, only on this foundation, by the particular constitution of the law of this country. It could not happen in any other country but this; because the jurisdiction of law and equity is administered here in different courts, and creates different kinds of rights in estates; and, therefore, as Courts of equity break in upon the common law, where necessity and conscience require it, still they allow superior force and strength to a legal title to estates; and, therefore, where there is a legal title and equity of one side, this Court never thought fit, that, by reason of a prior equity against a man who had a legal title, that man should be hurt; and this by reason of that force this Court necessarily and rightly allows to the common law and to legal titles. But if this had happened in any other country, it could never have made a question; for if the law and equity are administered by the same jurisdiction, the rule, *qui prior est tempore potior est jure*, [*616] must hold." And see the remarks of Sir W. *Page Wood, V. C., in *Rooper v. Harrison*, 2 K. & J. 108, 109.

And it seems that where a person has lent his money upon the security of land, although the security taken is in the form of a conveyance upon trust to sell and pay the sum advanced, he may, by obtaining a transfer of the first mortgage gain priority over an intermediate incumbrancer; see *Spencer v. Pearson*, 24 Beav. 266; there the owner of land mortgaged first to Jackson, secondly to Mossop; and he then conveyed

it to the plaintiff in trust to sell and pay Jackson and a debt due to a bank, another debt due to the plaintiff, and the residue to the owner. The plaintiff, who had no notice of Mossop's mortgage at the time of the conveyance to him, but discovering its existence by Mossop's instituting a suit for foreclosure, obtained a transfer of Jackson's mortgage. It was argued, that as the plaintiff had taken the conveyance to secure an existing debt, and not in consideration of money advanced on the security of the land, and as the conveyance was not in the form of a mortgage but of a conveyance in trust, he could not tack. Sir John Romilly, M. R., however, said, "he thought that this was an ordinary case of tacking. It was clear that the plaintiff had advanced his money on a security without notice of a prior one, and he afterwards got in the first and the legal estate. Mr. Mossop might have done the same if he had thought fit, but he had not done so."

In the well-known case of *Brace v. The Duchess of Marlborough*, 2 P. Wms. 491, the whole doctrine is very accurately stated by Sir Joseph Jekyll, M. R., in a series of rules which it is proposed to consider. The first general rule there laid down, within which, indeed, the principal case falls, is, "that if a third mortgagee buys in the first mortgage, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and got the law on his side, and equal equity, he shall thereby squeeze out the second mortgagee; and this the Lord Chief Justice Hale called a 'plank' gained by the third mortgagee; or tabula in naufragio, which construction is in favour of a purchaser, every mortgagee being such pro tanto."

Where, however, a puisne mortgagee, having obtained the legal estate, parts with it on a sale of the mortgaged estate, he will only be entitled to claim a share of the purchase-money according to his priority in point of date. See *Rooper v. Harrison*, 2 K. & J. 86. "If," said Sir W. P. Wood, V. C., "the Court does not find the legal estate interposed, it deals with the money according to priorities," p. 109.

It will be observed that it is *laid down by Sir Joseph Jekyll, [*617] as in the principal case, that it matters not if the third mortgagee advanced his money without notice of the second mortgage, whether he afterwards obtains notice of it by a *lis pendens* or otherwise. "This," says Lord Hardwicke, "has gone so far (and the original case was) that if a puisne incumbrancer took in the first incumbrance *pendente lite*, still he should have the same benefit: for in *Marsh v. Lee*, there was a *lis pendens*, yet it was not the party affected with it; and so, I take it, in general it would be, notwithstanding a *lis pendens*; because the principle upon which all these cases depend is this, that a man's having notice of a second incumbrance at the time of taking in the first does not hurt; it is the very occasion that shows the necessity of it. It is only notice at the time of taking in the third, that will affect

him; for then, no act he will do can help him. Then a *lis pendens* is nothing but notice; an actual notice is certainly as good as that by a *lis pendens*; one notice is, in consideration of this Court, as strong as another. Nay, actual notice is stronger than that implied by a *lis pendens*; it will not therefore affect him. That was *Marsh v. Lee*, and the other cases, which I agree to:” *Wortley v. Birkhead*, 2 Ves. 514. See also *Huntington v. Greenville*, 1 Vern. 49; *Hawkins v. Taylor*, 2 Vern. 29; *Belchier v. Butler*, and *Renforth v. Ironside*, 1 Eden, 523; *S. C.*, 5 Bro. P. C. 292, Toml. Ed., nom. *Belchier v. Renforth*; *Turner v. Richmond*, 2 Vern. 81; *Willoughby v. Willoughby*, 1 T. R. 773; *Robinson v. Davison*, 1 Bro. C. C. 63; *Spencer v. Pearson*, 24 Beav. 266; *Bates v. Johnson*, Johns. 304; *In re Russell Road Purchase Moneys*, 12 L. R. Eq. 78.

And notwithstanding the doubt thrown out by Lord Eldon, in *Mackreth v. Symmons*, 15 Ves. 335, ante, 289, it is now clearly settled, that notice of his advance, given by the second to the first mortgagee, will not prevent the third mortgagee, who lends his money without notice of it, from obtaining a transfer of and tacking his mortgage to the first: *Peacock v. Burt*, Coote on Mortgages, 569, 572; *S. C.*, 4 L. J., N. S., Ch. 33.

So where two or more successive mortgagees advance their money upon the security of real property, without notice of a prior trust fraudulently concealed by the mortgagor, the first mortgagee taking a mortgage of the legal estate, the last mortgagee is at liberty, after notice of the trust, and pending a suit by the cestuis que trust for redemption of the first mortgage, to pay off all the prior mortgages, and upon getting in the legal estate, to hold it until all the moneys advanced by him have been paid in full: *Bates v. Johnson*, Johns. 304.

[*618] *The authorities have gone to this extent, that any person having an unsatisfied mortgage or charge upon real property is at liberty at any time before decree, to convey the legal estate in the property, in respect of his *unsatisfied* charge, to any subsequent incumbrancer who may have advanced his money without notice of any intervening or other charge or incumbrance, and by so doing may give to that other incumbrancer a right, which this Court cannot take from him, to insist upon the legal estate which, as the Court holds, he has thus properly acquired (per Wood, V. C., Johns. 315).

In the case, however, of a *satisfied* mortgage, where the mortgagee would hold simply upon trust for the original mortgagor, or those claiming under him, or in the case of a trustee of a satisfied term, a subsequent incumbrancer cannot, by obtaining a conveyance from such mortgagee or trustee, *who at the time he made such conveyance had notice* of an intervening charge or trust, protect himself from such charge or trust by means of the legal estate which he has so obtained: *Carter v. Carter*, 3 K. & J. 617, 640; *Bates v. Johnson*, Johns. 304,

315, 316; *Prosser v. Rice*, 28 Beav. 74; but see *Pilcher v. Rawlins*, 7 L. R. Ch. App. 259, 274.

Upon the same principle, the priorities of several successive equitable mortgagees cannot be altered by the transfer, by the mortgagor, of the legal estate to any one of them, the mortgagor being a trustee of the legal estate for all such incumbrancers: *Sharples v. Adams*, 32 Beav. 212, 216, 11 W. R. (M. R.) 450.

A puisne incumbrancer will not be allowed to tack after a decree made to settle priorities of incumbrances: *Earl of Bristol v. Hungerford*, 2 Vern. 524, approved of by Lord Hardwicke in *Wortley v. Birkhead*, 2 Ves. 574. So, in *Ex parte Knott*, 11 Ves. 619, Lord Eldon observed, "There is no difficulty upon the point as to a decree to settle priorities. After that you cannot tack certainly, for there is a judgment for the creditors that they shall be paid according to their priorities. But you may, as was held in the House of Lords, up to the time of the decree, struggle for the tabula in naufragio; and, though the decree is in a sense only a judgment upon the rights as they stood at the time the bill was filed, yet it was decided in that case, that until the decree you might do so." And see *Re Scott's Est.*, 14 Ir. Ch. R. 57.

An exception to the rule is mentioned by Lord Hardwicke, viz., that if a prior mortgagee takes an assignment of a third mortgage, as a trustee only for another person, he shall not be allowed to tack the two mortgages together, to the prejudice of intervening incumbrancers. If this was permitted, a mere stranger purchasing the third mortgage, by declaring he bought it in trust only for the first mortgagee, might tack both together, and defeat all the other incumbrancers: Per Lord Hardwicke, in *Morrett v. Paske*, 2 Atk. 52. So, also upon the same principle, it was held in *Barnett v. Weston*, 12 Ves. 130, that the executors of a first mortgagee of a leasehold, who had the legal estate in his own right, could not, as against a mesne incumbrancer, tack a mortgage of the equity of redemption which had vested in their testator as the executor of another. See and consider *Wilmot v. Pike*, 5 Hare, 14; *Rooper v. Harrison*, 2 K. & J. 86.

The second rule laid down in *Brace v. The Duchess of Marlborough*, 2 P. Wms. 491, in accordance with which that case was decided, is, "that, if a judgment creditor, or creditor by statute or recognisance, buys in the first mortgage, he shall not tack or unite this to his judgment, &c., and thereby gain a preference; for one cannot call a judgment creditor a purchaser, nor has such creditor any right to the land; he has neither jus in re nor ad rem; and, therefore, though he releases all his right to the land, he may extend it afterwards. All that he has by the judgment is a lien upon the land, but non constat whether he will make use thereof; for he may recover the debt out of the goods of the cognizor by fieri facias, or may take the body, and then, during the

defendant's life, he can have no other execution: besides, the judgment creditor does not lend his money upon *the immediate view or contemplation of the cognizor's real estate*, for the land afterwards purchased may be extended on the judgment: nor is he deceived or defrauded, though the cognizor of the judgment had before made twenty mortgages of all his real estate; whereas a mortgagee is defrauded, or deceived if the mortgagor before that time mortgaged his land to another." And see *Ex parte Knott*, 11 Ves. 617.

Upon the same principle, in *Lacey v. Ingle*, 2 Ph. 413, A., having mortgaged an estate to B. and C. in succession, agreed to sell it to D. free from incumbrances; part of the purchase-money was to be paid down, and the rest on completion of the purchase. During the investigation of the title, A. induced D., who was ignorant of the mortgages, to make further payments on account of the purchase-money; and having also raised a further sum from E. on the security of his contract, without giving him notice of C.'s mortgage, became insolvent, and absconded. D., thereupon, with notice of all that had happened, paid off C.'s mortgage out of the balance of the purchase-money remaining due; and E., to secure himself, took an assignment of B.'s mortgage. But *the balance of purchase-money not being sufficient to pay both E.'s charge and what E. had paid to B., Lord Cottenham, C., reversing the judgment of the Vice-Chancellor Knight Bruce, held, that E. was not entitled to tack his security to B.'s mortgage, first, because he not only did not deal *upon the faith of the land*, or contract for any interest in it, but, as appeared upon the face of the contract, relied upon and advanced his money upon the faith of a fund which could only arise and have existence upon the supposition that the party to whom he advanced the money would not have, and at that time had not, any interest in the land; and, secondly, because, although E., at the time he advanced his money, had no notice of any particular incumbrance on the estate, except B.'s, he knew that he was dealing for a supposed balance, out of which D., having contracted for the estate free from incumbrances, would be entitled to pay off any incumbrances to which the estate might be found to be subject; and, therefore, the equities of D. and E. were not equal.

And it seems doubtful whether a judgment creditor, since the passing of 1 & 2 Vict. c. 110, although a judgment duly registered is now a charge upon the land, can tack any more than he could previously. (See *Kinderley v. Jervis*, 22 Beav. 1; *Beavan v. Lord Oxford*, 6 De G. Mac. & G. 507; *Pickering v. The Ilfracombe Railway Company*, 3 L. R. C. B. 235; *Robinson v. Nesbitt*, Ib. 264, overruling *Watts v. Porter*, 3 Ell. & Br. 743). According to a recent learned author, he can do so (Fish. on Mortgages, 665, 2d edit.); but he states that in the case of judgments entered up since 23 & 24 Vict. c. 38, and 27 & 28 Vict. c.

112, respectively, there will be no tacking until execution, as required by those acts, has been executed (Ib. 666).

Another rule in *Brace v. The Duchess of Marlborough*, 2 P. Wms. 494, is, "that if a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee till both the mortgage and statute or judgment be paid." (See, also, *Shepherd v. Titley*, 2 Atk. 348; *Anon.*, 2 Ves. 662.) A fortiori, if the first mortgagee lends on a mortgage: *Morret v. Paske*, 2 Atk. 52; *Godfrey v. Tucker*, 33 Beav. 280; *Wyllie v. Pollen*, 11 W. R. (L. C.) 1081. But as will be shown hereafter, the further advance of the first mortgagee must have been made without notice of the intermediate incumbrance.

In the recent case of *Young v. Young*, 3 L. R. Eq. 801, affords a strong illustration of the rule. There a testator, in 1832, devised his copyhold estate, (which was subject to a legal mortgage by customary grant and admittance,) to his wife, for life, and then to *his children. The will was never proved, and no notice of it was [*621] entered on the Court Rolls. The widow emigrated in 1845, leaving her eldest son in possession of the estate as her agent. In 1851, the son, falsely representing himself to be in possession as heir of his father, procured a further advance upon mortgage of the estate; and the original mortgage being transferred to the second mortgagee, he claimed a right to tack his further advance. The widow died in 1860. It was held by Sir R. Malins, V. C., that the mortgagee, having the legal estate, and having no notice of any adverse title, was entitled to be protected against the rights of the children, and to tack his further advance. See *Jones v. Powles*, 3 My. & K. 581; *Carter v. Carter*, 3 K. & J. 617, 638.

Where the mortgage is paid off before the judgment is recovered, the judgment cannot be tacked to the mortgage, although there may not have been any reconveyance of the mortgaged estate: *The Mayor of Brecon v. Seymour*, 26 Beav. 548.

However, in all these cases, as is laid down in the sixth rule in *Brace v. The Duchess of Marlborough*, 2 P. Wms. 495, no subsequent incumbrancer will be allowed to tack his incumbrance, unless when he lent his money he had *no notice of* the second mortgage, statute, or judgment; for being without notice is his sole equity.

And it has even been held, contrary to the old case of *Gordon v. Graham* (7 Vin. Ab. 82, pl. 7: 2 Eq. Cas. Ab. 598), that although the first mortgage was made to secure a sum and *further advances*, if the first mortgagee made a further advance with notice of a mesne incumbrance, he will not be entitled to priority in respect of such further advance. See *Shaw v. Neale*, 20 Beav. 157; there an estate was mortgaged to A. to secure a sum of money and *further advances*. Afterwards Shaw, the plaintiff, obtained a charge on the estate by

means of a judge's order. It was held by Sir John Romilly, M. R., that the further advances made to the mortgagor by A., after notice of the order, had no priority over Shaw's charge. "The law," said his Honor, "with respect to the question whether a second incumbrancer, who takes, subject to a prior mortgage expressed to secure a sum then due, and also future advances, is entitled to priority over the advances made subsequently to his security by the first incumbrancer, with notice of such second incumbrance, is a point not free from doubt on the authorities. The ground on which it is put, in favour of the first mortgagee who claims priority for his subsequent advances, is, that the second mortgagee might, by a tender of the amount due to the first mortgagee, have stopped all further advances: and the case of *Gordon v. Graham*, (7 Vin. Ab. 52, pl. 3; 2 Eq. Ca. Ab. *598) is cited, [*622] where Lord Cowper held, that the second incumbrancer having, when he advanced his money, notice of the nature of the first mortgage, could not redeem the first mortgage without payment of the sum advanced by the first mortgagee after he had received notice of the second incumbrance. This decision has not met with the unanimous approbation of the profession. Mr. Powell, in his *Treatise on Mortgages* (2 Pow. Mortg. 6th Ed. 534, n.; but see 4 Byth. 2d Ed. 427), doubts the soundness of the decision; and Lord St. Leonards, in *Blunden v. Desart* (2 Dru. & W. 405), says, 'that even in the case of a first mortgage, whether legal or equitable, covering future advances, it deserves further consideration, whether it would be safe to rely in all cases upon *Gordon v. Graham*, as an authority that advances may be safely made after the first mortgagee has notice of a second mortgage.' This case of *Gordon v. Graham* has never, I believe, been treated as an authority for holding that the doctrine applied to the case of a second incumbrancer, who advanced his money *without notice* of the first mortgage. Lord Cowper certainly relies on the fact of notice; for he observes, that it was the folly of the second mortgagee, with notice (of the first incumbrance) to take such security. This reasoning obviously fails to apply to the case of a second incumbrancer, who not only had no notice of the prior incumbrancer, but who obtains his charge on the estate not by reason of any contract with the owner, but by operation of law, which gives to the registered order to pay the effect of an incumbrance on the land, for a debt which the debtor had refused or was unable to pay." His Honor's judgment was affirmed by the House of Lords. *Shaw v. Neale*, 6 Ho. Lo. Cas. 581; and was followed by *Rolt v. Hopkinson*, 25 Beav. 461; 3 De G. & Jo. 177; *S. C.*, nom. *Hopkinson v. Rolt*, 9 Ho. Lo. Ca. 514. So likewise in *Daun v. City of London Brewery Company*, 8 L. R. Eq. 155; on the 26th of March, 1858, a publican deposited the lease of his public-house with the defendants—a Brewery Company—with a memorandum, stating, that the deposit was to secure payment of a sum of 20*l.* and

interest, as well as any other sums in which the depositor might become indebted to the Brewery Company on any account, not exceeding 500*l*. The Brewery Company on the 7th of July, 1865, made the publican a further advance of 100*l*. On the 11th of July, 1865, the publican signed to the plaintiffs—a firm of distillers—a memorandum, whereby he declared that the documents deposited with the Brewery Company, should “subject to the security” to the Brewery Company be a security to the distillers for a sum of 120*l*. then due, and *interest and all other sums that might thereafter become due to the distillers. Notice of this second equitable mortgage was [*623] on the same day given by the distillers to the brewers. After the date of this notice the publican became indebted to the brewers in a further sum of money—the price of beer supplied to the publican. The company claimed to be entitled, by virtue of a custom in the trade between brewers and publicans, to add this further sum to the amount secured by the deposit of the lease in priority to the distillers’ charge. It was held, however, by James, V. C., that the alleged custom was bad in law for want of mutuality, and for want of defined limits; and further, that it was imperfectly supported by the evidence; and that consequently, according to the rule laid down in *Hopkinson v. Rolt*, the defendants, the Brewery Company, from and after the date of the second charge, were not entitled to any priority in respect of any goods supplied by them after the notice; and with respect to such goods, both parties having notice of the securities, their priorities were to be according to the dates of their respective supplies.

And the result will be the same, although the securities are executed on the same day and with the knowledge of all parties: *Menzies v. Lightfoot*, 11 L. R. Eq. 459.

The principle upon which these cases proceed is this, that the second charge was so framed as if it had said, “subject to the security as it stands at the moment,” that is, to the amount of money now due on the security: Per Lord Romilly, M. R., in *Menzies v. Lightfoot*, 11 L. R. Eq. 468.

If the parties wish to escape from this, they must say “subject and without prejudice to the principal moneys now due from me, and to such sums as I may hereafter owe, not exceeding the sum of £——.” *Ib*.

Where, however, in a case similar to *Hopkinson v. Rolt*, the further advance is made by the first mortgagee without notice of an intervening advance by the second mortgagee, the first mortgagee will have priority over the second mortgagee, not only in respect of his first, but also in respect of his second advance (*Calisher v. Forbes*, 7 L. R. Ch. App. 109); nor will the first mortgagee lose his priority over the second mortgagee, if subsequently thereto he renews the original bill of exchange given for the sum advanced on the first mortgage. *Ib*. And

see *Saunders v. Dehew*, 2 Vern. 271; *Allen v. Knight*, 5 Hare, 272; *Cannock v. Jauncey*, 5 W. R. (V. C. K.) 764.

The last rule laid down in *Brace v. The Duchess of Marlborough*, 2 P. Wms. 495, is "that when a puisne incumbrancer buys in a prior [*624] mortgage, in order to *unite the same to the puisne incumbrance, but it is proved that there was a mortgage prior to that, the Court clearly holds, that the puisne incumbrancer, where he had not got the legal estate, or where the legal estate was vested in a trustee, could there make no advantage of his mortgage; but in all cases where the legal estate is standing out, the several incumbrances must be paid according to their priority in point of time: *qui prior est tempore potior est jure*." See *Symmes v. Symonds*, 4 Bro. P. C. 328; Toml. Ed.; *Earl of Bristol v. Hungerford*, 2 Vern. 524; 1 Eq. Ca. Ab. 142; *Phillips v. Phillips*, 4 De G. F. & J. 268; *Thorpe v. Holdsworth*, 7 L. R. Eq. 139.

An equitable mortgagee, earlier by registration, even on the same day, under 7 Ann. c. 20, obtains priority over an equitable mortgagee prior in date, of which he had no notice, and he may consolidate his mortgages as against him: *Neve v. Pennell*, 2 H. & M. 170; 11 W. R. (V. C. W.) 986.

But if any one of the incumbrancers has a better title than the others to call for a conveyance of the legal estate, as for instance, when a declaration of trust of the legal interest has been made in his favour, or he has possession of the title-deeds, equity will consider him as being in the same position as if he had the legal estate: *Windham v. Richardson*, 2 Ch. Ca. 213; *Wilkes v. Bodington*, 2 Vern. 599; *Earl of Pomfret v. Lord Windsor*, 2 Ves. 486; *Ex parte Knott*, 11 Ves. 618; *Maundrell v. Maundrell*, 10 Ves. 271; *Wilmot v. Pike*, 5 Hare, 22; *Pease v. Jackson*, 3 L. R. Ch. App. 576.

The result is the same where an incumbrancer obtains the legal estate after advancing his money, in pursuance of a contract for a legal mortgage entered into at the time of the advance. See *Cooke v. Wilton*, 29 Beav. 100, there Anne Halling, in 1856 and 1857, deposited the title deeds of some freehold property with Ann Broughton to secure two sums advanced to her, and agreed in writing to execute a mortgage of it to secure the money. In 1858 the plaintiffs lent Anne Halling 91l. 10s., and on the first of July they obtained a transfer of the two prior equitable mortgages, then amounting to 368l. 4s. Anne Halling at the same time signed a memorandum by which she declared that the 368l. 4s. and the money due to or to be advanced by the plaintiffs should be a charge on the property. The plaintiffs advanced further sums, and on the 29th of September, 1858, Anne Halling conveyed the legal estate in the property to the plaintiffs, subject to redemption on payment of 520l., the aggregate of the moneys due. Previous to the transfer of the mortgages to the plaintiffs, viz., on the 29th of June, 1858,

the defendant obtained *a judgment against Anne Halling for [*625] 638l. 12s. 10d., duly registered under 1 & 2 Vict. c. 110; but the plaintiffs did not know of the judgment until March, 1859. Sir John Romilly, M. R., held that the plaintiffs had priority over the judgment. "I think," said his Honor, "that the equitable mortgage and memorandum of deposit gave to Ann Broughton, and to all persons claiming through or under her, a right to have a legal mortgage of the property affected by the equitable mortgage, and of which the title deeds had been deposited, and that, consequently, the legal estate, when conveyed, must be considered to have reference back to the date of that security when given, and that all sums properly advanced are included in it; and if this be so, then the mortgagee is entitled to make use of the legal estate so obtained, to protect him not only for the amount due at the date of the deposit, but for any further or subsequent advance made by him on the security of the same property, bona fide, and without notice of any prior charge, on the principle of the doctrine which is usually called tacking."

As a general rule, both in suits for foreclosure as well as in redemption suits, the mortgagor cannot redeem one mortgage without redeeming all other mortgages which the mortgagee holds upon his property, and which he has a right to consolidate or tack together: (*Watts v. Symes*, 1 De G. Mac. & G. 240; *Selby v. Pomfret*, 1 J. & H. 336; 9 W. R. (L. C.) 583; *Neve v. Pennell*, 2 H. & M. 170; and see *Phillips v. Gutteridge*, 4 De G. & Jo. 531). Nor can the purchaser (*Beevor v. Luck*, 4 L. R. Eq. 537) or mortgagee of the equity of redemption do so: (*Ib.* 546; *Tilley v. Davies*, 2 Y. & C. C. C. 399, n.): And it is immaterial whether the consolidation has taken place before or after the purchase or mortgage of the equity of redemption (*Ib.*; and see *Vint v. Padget*, 1 Giff. 446; 2 De G. & Jo. 611; *Tweeddale v. Tweeddale*, 23 Beav. 341), or whether such purchaser or mortgagee may or may not have had notice of the existence of other mortgages: (*Ib.*; *Tilley v. Davies*, 2 Y. & C. C. C. 399, n). And the rule is applicable to equitable mortgages (*Neve v. Pennell*, 2 H. & M. 170); to mortgages of equitable personalty by way of trusts for sale, as well as to ordinary mortgages of real estate (*Watts v. Symes*, 1 De G. Mac. & G. 240) and it makes no difference whether the mortgages are held by the same person, or in trust for the same person: *Tassell v. Smith*, 2 De G. & Jo. 713, 718.

In the old case of *Bovey v. Skipwith*, 1 Ch. Ca. 201, where the third mortgagee of one estate who advanced his money without notice of an intermediate mortgage of that and another estate, bought in and took a transfer* of a first mortgage, comprising both estates, it was [*626] decided that he might hold the two estates as against the second mortgagee until all that was due to him on both securities should be satisfied. The question, however, of notice, at the time of the con-

solidation, as before mentioned, is immaterial. Thus, where two mortgages of distinct estates, originally vested in different mortgagees, were transferred to one person, even with notice of a second mortgage of both estates, it was held that the second mortgagee could not redeem the one estate without the other: *Vint v. Padget*, 1 Giff. 446, 2 De G. & Jo. 611; and see *Tweedale v. Tweedale*, 23 Beav. 341. There A. made two equitable mortgages of two several estates, the one to A. and the other to B. He then executed a legal mortgage of both to C., who had constructive notice of the prior equitable mortgages. B. obtained a transfer of A.'s mortgages. It was held by Sir John Romilly, M. R., that C. could only redeem B. on payment of both debts.

Where mortgages of different properties by the same mortgagor have been consolidated by a mortgagee, and the mortgagor has conveyed the equity of redemption in some of the properties to purchasers by deeds of various dates, upon foreclosure by the mortgagee, a first right of redeeming all the mortgages will be given to the first purchaser of part in point of date, with successive rights of redemption, in default, to the subsequent purchasers of other parts in order of date, as in the case of first, second, and third mortgagees: (*Titley v. Davies*, 2 Y. & C. C. C. 399, n., and *Beevor v. Luck*, 4 L. R. Eq. 537; overruling *Edwards v. Martin*, 28 L. J. Ch. 49; 4 Jur. N. S. 1044; 7 W. R. 31). But where the owners of the equity of redemption, though of different priorities as to their period of enjoyment, come in under the same instrument, as for instance tenant for life, and remainderman under a settlement, there no successive rights to redeem are given, but only one single common right of redemption: *Beevor v. Luck*, 4 L. R. Eq. 537, 548.

The principle upon which these cases proceed, as appears from the authorities, is stated by Lord Hatherley, C., as follows: "That where a man has not redeemed his mortgaged property within the limited time and has forfeited his estate, when he comes into equity to assert a right to have the estate back, the Court has said, 'you shall not have equity without doing equity;' and if therefore, having mortgaged a valuable estate as an ample security for an advance made by one mortgagee, you have afterwards mortgaged to the same mortgagee an estate of less value, and the smaller estate will not pay the whole debt, you shall not [*627] redeem the estate which is valuable *to you without also paying the debt which is secured on the deficient security.' Afterwards that equity was extended (whether rightly or wrongly it is now too late to question) to the case of a person who takes a transfer of the deficient mortgage on the smaller estate. If he gets in the interest of a prior mortgagee from the same mortgagor, he is entitled to stand as against all purchasers subsequent to the second mortgage coming to redeem, and to say, 'You cannot redeem one unless you redeem both:' *Titley v. Davies*, 3 Y. & C. C. C. 399, n. was a case of that descrip-

tion And where there is a third mortgage of the equity of redemption, which takes place anterior to the union of two prior mortgages in the person who attempts to foreclose a third mortgage, there the equity must prevail, &c. . . . Lord Hardwicke, in the case of *Titley v. Davies*, (2 Y. & C. C. C. 399, n.) says this: 'I see no difference between Peyton and Davies' (Peyton being the purchaser), for though one was a purchaser, and the other a mortgagee, that will not differ the case as to Titley; for they are both considered as purchasers in this Court pro tanto.' So that it would be impossible for me to draw a distinction between the case of a purchaser and that of a person coming in as a mortgagee. The real point seems to be this, as far as it is possible to apply reasoning to a rule which is somewhat difficult to reconcile altogether with sound principles: whenever the right to redemption is passed over to another person by the original mortgagor, whether he sells the whole property or passes it by way of mortgage only—in either one case or the other, he passes it over subject to the same equities as against the purchaser or mortgagee to which he himself was subject. That being so, the purchaser is obliged to take it, as was said in *Vint v. Padget*, (2 Y. & C. C. C. 399, n.), knowing that it is liable to the contingency of the coalescing of the two mortgaged estates, even although at the time of the conveyance they may not have coalesced. In *Vint v. Padget*, the person who united the two securities, and then asserted the right, knew before he united them that there was this intervening security. The Court said that the question of notice had nothing to do with it; the plaintiff has a right to unite the two estates; and, having that right, the person who is unfortunately affected by it must be taken to have known that there was the possibility of such union taking place. Knowing that he should not have advanced his money on the second mortgage: " *Bevor v. Luck*, 4 L. R. Eq. 544, 546.

A mortgagee may, on the bankruptcy of the mortgagor, if his assignees do not immediately redeem, *take a transfer of a mortgage on another of his estates, and tack it to the debt due under [*628] the mortgage to himself, and he is entitled to hold the two estates as a security for both debts (*Selby v. Pomfret*, 1 J. & H. 336; 3 De G. F. & Jo. 595); and the right of such mortgagee is not prejudiced by reason of his having exercised the power of sale contained in the mortgage so transferred to him, and he is entitled to retain the surplus of the purchase-money beyond the amount secured on that mortgage to satisfy the sum due to him on his own mortgage. *Ib.*

Where a first mortgagee or any of the mortgagees purchases and takes a conveyance to himself of the equity of redemption, he cannot set up his mortgage against any of the subsequent incumbrances of which he had notice: *Toulmin v. Steere*, 3 Mer. 210; *Brown v. Stead*, 5 Sim. 535; sed vide *Hayden v. Kirkpatrick*, 13 W. R. (M. R.) 1010;

11 Jur. N. S. 836; but a prior mortgage, if kept on foot against the estate, may be used by the purchaser of the equity of redemption, as a protection against the intervening incumbrances. See *Parry v. Wright*, 1 Sim. & St. 369; *S. C.*, 5 Russ. 142; and see *Otter v. Lord Vaux*, 2 Kay & J. 650; 6 De G. Mac. & G. 638; *Chesshyre v. Biss*, 2 Giff. 287; and *Leading Cases on Real Property*, 2nd ed., 855.

As to the nature of Statutes and Recognisances, see *Burton's Compendium*, pl. 868.

Mortgagee's right to tack debts not being liens on the mortgaged property.—With regard to the right of a mortgagee to tack to his security debts not being liens upon the estate, it seems that in the case of a mortgagee of real estate as against the heir (*Margrave v. Le Hooke*, 2 Vern. 207; *Jackson v. Langford* (Anon.), 2 Ves. 662; *Morret v. Paske*, 2 Atk. 53; *Jones v. Smilh*, 2 Ves. Jun. 376; *Elvy v. Norwood*, 5 De G. & S. 240) and devisee (*Heames v. Bance*, 3 Atk. 630; *Coleman v. Winch*, 1 P. Wms. 775; *Du Vigier v. Lee*, 2 Hare, 340) of the mortgagor, he might always tack specialty debts, and under 3 & 4 Will. 4 c. 104, he may as against the heir or devisee of the mortgagor, tack simple contract debts: *Rolfe v. Chester*, 20 Beav. 610.

In the case of a mortgage of personalty, the mortgagee as against the executor of the mortgagor, could always tack, not only bond and other specialty (Anon., 2 Vern. 176), but also simple contract debts: *Coleman v. Winch*, 1 P. Wms. 775; *Eccles v. Thawill*, Prec. Ch. 18; and see *Spalding v. Thompson*, 26 Beav. 637; *Re the General Provident Assurance Company* (claim of the National Bank), 20 W. R. (V. C. M.) 939; *In re Hazlefoot's Estate*, 13 L. R. Eq. 327, where policies of assurance were mortgaged.

But a mortgagee cannot tack *debts not being liens upon the [*629] mortgaged estate, whether they be bond or other specialty debts or simple contract debts, as against the mortgagor (*Challis v. Casborn*, Prec. Ch. 407; *Archer v. Suatt*, 2 Stra. 1107; *Elvy v. Norwood*, 5 De G. & Sm. 240), his creditors (*Coleman v. Winch*, 1 P. Wms. 775; *Heames v. Bance*, 3 Atk. 630; *Hamerton v. Rogers*, 1 Ves. Jun. 513; *Adams v. Claxton*, 6 Ves. 225; *Rolfe v. Chester*, 20 Beav. 610), his assignees for value (*Troughton v. Troughton*, 1 Ves. 86; *Jackson v. Langford*, (Anon), 2 Ves. 662; *Adams v. Claxton*, 6 Ves. 225), devisees in trust for payment of debts (*Heames v. Bance*, 3 Atk. 630; *Irby v. Irby*, 22 Beav. 217), parties entitled to the benefit of a charge for payment of his debts (*Price v. Fastnedge*, Amb. 685), or the assignee of his heir (*Coleman v. Winch*, 1 P. Wms. 775; *Bayly v. Robson*, Prec. Ch. 89), executor (*Coleman v. Winch*, 1 P. Wms. 775; *Vanderzee v. Willis*, 3 Bro. C. C. 21, 23), or devisee (*Id.*), or any mesne incumbrancers, whether by mortgage, judgment or statute: *Morret v. Paske*, 2 Atk. 52; *Powis v. Corbet*, 3 Atk. 556; *Lowthian v. Hazel*, 3 Bro. C. C. 162; *Anon.*, 2 Ves. 662.

The reason why the tacking of debts by mortgagees has been allowed, is to prevent a circuitry of action against persons in whose hands the equity of redemption of the mortgaged properties were assets for the payment of debts: see *Heames v. Bance*, 3 Atk. 630; *Lowthian v. Hasel*, 3 Bro. C. C. 162; *Anon.*, 2 Ves. 662.

Under the doctrine of tacking, a mortgagee, or those who claim under him, where the mortgage debt is secured, either by the ordinary covenant in the mortgage deed or a bond, may in a suit for redemption or for foreclosure claim by statute 3 & 4 Will. 4, c. 42, s. 3, arrears of interest for twenty years before the institution of the suit under the covenant or bond, although by the statute 3 & 4 Will. 4, c. 27, s. 42, under the deed, without either the covenant or bond, his right to recover interest is limited to six years' arrears: *Du Vigier v. Lee*, 2 Hare, 326; *Hunter v. Nockolds*, 1 Mac. & G. 640, 650.

The principle established in *Marsh v. Lee*, that a third mortgagee, without notice, may buy in the first mortgage, and thereby exclude a second mortgagee, does not appear to be received in any court in this country. The system of registration is universal here, and it is considered to be the policy of that system, that a mortgage shall not be a security for more than the debt expressed in the mortgage, *as against other incumbrances*. In New York, Connecticut, Ohio, and Virginia, the doctrine has been expressly condemned and excluded.

In *Grant and others v. Bissett and others*, 1 Caines' Cases, 112, the chancellor had decided in favor of the practice of tacking, but his decision was reversed in the Court of Errors, where it was decided that the statute which directs that mortgages which are first registered, shall have preference according to the times of the registry, had abolished, with respect to registered mortgages,

the right of tacking a junior to a senior mortgage, and thus excluding an intervening one; since the allowing of a junior mortgage to be paid first, would be denying to the older one the preference given to it by statute. "Under our laws, and the decisions of our own courts," said the chancellor in *Bridgen v. Carhartt*, Hopkins, 234, 235, "a registered mortgage is regarded as an incumbrance for the debt expressed in the mortgage, and for no greater sum. Such is the sense of the act concerning mortgages; and though the great objects of the registry are to secure mortgagees, to give notice to purchasers, and to regulate priorities, it seems also to be the spirit of all our statutes respecting mortgages, that a registered mortgage shall never become a security between any parties, for any other debt than that specified in the registered instrument. The English doctrine, by which a mortgage subsequent to a second mortgage may be tacked

to the first, in exclusion of an intermediate mortgage, has been adjudged by the Court of Errors, to be inconsistent with our law concerning registered mortgages, 1 Caines' Cases in Error, 112. The English doctrine of tacking has thus been rejected, in the only adjudged case in which any attempt to enforce it appears to have been made in our courts."

"We have not adopted, in this State," said Huntington, J., in *Osborn v. Carr*, 12 Connecticut, 196, 208, "the doctrine of tacking mortgages, so as to give priority to a third mortgagee over an intervening one. This is a consequence of the admitted rule, that the registry of a deed, is, here, constructive notice, and equivalent to actual notice, of the specific mortgage, which is recorded. .

. . . The doctrine of tacking, as understood in England, and which is merely giving priority to a third mortgagee, as to his mortgage, over an intermediate incumbrance, by buying in the legal title, cannot exist here, because the record of the second mortgage is equivalent to actual notice of its existence. Such has always been the law of this State. . .

. There are other reasons than those which we have suggested, which, independent of decided cases in our courts, would constrain us to reject the English doctrine of tacking. It is unjust and inequitable, and is supported there, only by the weight of authority. . . . The case of *Marsh v. Lee*, was perhaps the first in which the English doctrine

of tacking was fully established. It was a precedent subsequently followed with evident reluctance, and which the courts in Westminster Hall did not feel at liberty to overrule. It may be added, that this doctrine is generally exploded in the United States, by which we are relieved from a multitude of refined distinctions, which have given intricacy to this peculiar branch of equity jurisprudence. (4 Kent's Com. 178, 179.)"

In Ohio, it is declared, that it has ever been held in that State, that the principle of tacking, as applied to mortgages, or to mortgages and judgments, cannot be allowed; *Braze and others v. The Lancaster Bank and others*, 14 Ohio, 318, 321.

In a late case in Virginia, this doctrine was examined at considerable length, and considered to be unreasonable in itself, and opposed to the policy of the registration acts. "This whole doctrine of tacking," said Baldwin, J., "unless in the case of further advances originally provided for by contract, is extremely harsh and unreasonable. Natural justice obviously requires that valid incumbrances should be paid according to their priority in point of time. The first incumbrance is an appropriation of the property by the consent of the owner, or the operation of law, to the satisfaction of a just demand; and so a second incumbrance is an appropriation, in like manner, of what shall remain after satisfaction of the first. The first incumbrancer

who, after a second incumbrancer, enlarges his demand beyond the effect of his original contract, is in truth, as regards the second, only a third incumbrancer; and a third incumbrancer is nothing more as regards his original demand, though he purchases in the first incumbrance.

"The doctrine is justified by no one, upon the principles of natural justice, and rests for its support upon artificial reasoning. It was introduced and is sustained upon the ground, that the mortgagee entitled to its benefit has the advantage of the legal title, and has equal equity, and therefore the law shall prevail. But the assumed equality of equity is not well founded. There is no color for it except in the idea that each claimant is a *bona fide* purchaser for a valuable consideration; but that does not produce equality in point of right. He whose incumbrance is thus overreached is prior in point of time, and at least equal in equity; and, therefore, should have the benefit of the maxim, *Qui prior est in tempore potior est in jure*.

"The elements of the doctrine, it will be seen, are the possession by the preferred mortgagee of the legal title, and the pre-existence or accession of a distinct equity, without notice of the *mesne* incumbrance. Hence it is obvious, that it could never have been introduced into a country enjoying the benefits of a general registry, intended to give notice to the whole world of all conveyances and incumbrances, and to supply

the place of actual notice. . . . In nearly all the States of this Union, the registry is held to be notice to subsequent purchasers and mortgagees, provided the deed has been duly proved or acknowledged. . . . It is easy to perceive that the operation of the registry laws of Virginia, and of other States of the Union, is to cut up by the roots the English doctrine of tacking, so far as it effects intermediate purchasers and incumbrancers." *Siter, Price & Co. v. M'Clanachan et als.*, 2 Grattan, 280, 300, 301, 303, 304.

In Kentucky, some earlier cases had apparently recognized the equity of tacking; *Bank of Kentucky v. Vance's Administrators*, 4 Littell, 168, 173; *Nelson's Heirs v. Boyce, &c.*, 7 J. J. Marshall, 401, 405; but in a late case the existence of this principle seems to be considered doubtful. "When a prior mortgage," said the court, "does not provide for subsequent liabilities or advances, the British doctrine of tacking all such liabilities as shall have been incurred, or all such advances as shall have been made, on the faith of the property thus mortgaged, and without actual notice of a subsequent mortgage thereon, has not been conclusively established in this court. And whether it shall be recognized here, as either authoritatively settled or as consistent with principle or analogy, we shall not now pause to determine or to consider:" *Averill v. Guthrie*, 8 Dana, 82, 84.

[The doctrine, that a purchase in good faith, and without notice,

gives the purchaser an equity, which a subsequent notice cannot take away, and which he may protect against antecedent equities, by procuring a conveyance of the legal title, has been assailed as unjust, but would seem to be a necessary consequence of the preference, which, between equal rights, should be awarded to superiority of diligence. Thus, a chattel sold successively to different persons, will belong to him to whom it is first delivered, or who first clothes his title with the possession; *Shaw v. Levy*, 17 S. & R. 99; *Winslow v. Leonard*, 12 Harris, 15; 1 Smith's Lead. Cas. 1083, 7th Am. ed.; and of two assignees, of the same *choses in action*, he will be preferred, in England, and in many of the States of the Union, who first gives notice of the assignment to the trustee or debtor, who owes or holds the obligation which forms the subject of the assignment; *post*, vol. 2, notes to *Basset v. Nosworthy*, and *Ryall v. Rowles*. That the holder of an equity, who neglects or fails to procure a conveyance of the legal title, should be postponed to a claimant whose estate is subsequent in date to his own, but who has guarded his interest with the forms of law, is therefore equally consistent with analogy and reason; and the cases which apparently tend the other way, seem to have turned on the rule, which makes the registration of a deed notice, and are not in point, where the question arises between unregistered equities, or when the registry acts are from any cause inappli-

cable. This view is sustained by the cases of *Baggaly v. Guthrie*, 2 Jones' Equity, 80, and *Carroll v. Johnston*, Ib. 120, which decide in accordance with the decisions in England, that when equities are equal in point of merit, each having been acquired in good faith, and without notice, and the junior equity gets the legal title, chancery will not intervene to take away the advantage which it confers, although its acquisition may have been with full notice of, and for the express purpose of obtaining priority over the elder equity; Coote on Mortgages, 383, 409. "It is," said Pearson, J., in *Baggaly v. Guthrie*, "a familiar learning, that one who has, without notice, acquired an equity, may afterwards protect it, by acquiring the legal title. The latter purchaser or incumbrancer, becomes, on payment of his money, an honest claimant in equity, and is entitled, if he can, to protect his claim. He is not bound to look for protection, until he has ascertained that danger exists; Adams, 232, (162.)" So in *Phillips v. Crammood*, 2 W. C. C. R. 441, an equitable pledge or mortgage was postponed to an assignment for the benefit of creditors, which, although subsequent in date, passed the legal title. The court said that neither party was a purchaser for value, the equities of both were equal, and he must prevail who had the law.

There would consequently seem to be nothing to prevent the holder of a third mortgage, from obtaining priority over a second, of which he was ignorant at the

time of taking his own, and which has not been placed on record, by buying in the first, or obtaining a conveyance of the legal title in any other way, although the question is one of little practical importance, because it cannot arise unless both mortgages are unrecorded, when it will always be easier to record the third, than to resort to the expedient of purchasing the first.

It is necessary to remember, that to render the legal title a protection against a prior equity, the holder must be a purchaser in good faith, in the sense in which equity defines a *bona fide* purchaser, and must, consequently, have bought on the faith of a real or pretended legal title, as well as for value and without notice; *post*, notes to *Basset v. Nosworthy*. It is therefore doubtful, whether one who buys a mere equity, with full knowledge of its real nature, can acquire an advantage over prior equities, by the subsequent acquisition of the legal title, although the point was held differently in *Baggaly v. Guthrie*, and *Carroll v. Johnston*; and the pledge of an equity growing out of a contract of sale, held to give the rights incident to a purchaser for value.]

There is another branch of the doctrine of tacking, quite distinct from that considered in the principal case: under which, when a mortgagee has made further advances to the mortgagor, and taken his bond, binding himself and his heirs, the mortgagee may tack such bond debt to his mort-

gage, as against the heir or devisee, who upon a bill filed to redeem is not allowed to do so without paying the bond as well as the mortgage debt; but this is admitted to be only a matter of practice, to prevent circuitry of action, and it is never allowed to the prejudice of another incumbrancer, or creditor, whose claim is of equal degree with the bond debt; see *Chase v. M'Donald and Ridgley*, 7 Harris & Johnson, 161, 196, 197; *Coombs v. Jordan*, 3 Bland, 284, 330; *Lee and Wife, and Jordan v. Stone and M'William*, 5 Gill & Johnson, 2, 22; *Downing, &c. v. Palmateer*, 1 Munroe, 64, 70; *Hughes and Ballinger v. Worley*, 1 Bibb, 200, 201; *Colquhoun v. Atkinsons*, 6 Munford, 550, 556; *Siter, Price & Co. v. M'Clanachan et als.*, 2 Grattan, 280, 299; *Robinson v. Urquhart*, 1 Beasley, 515. In South Carolina, this rule has been laid down in much larger terms, it is said there, that on a bill filed by the mortgagor to redeem, he must pay not only the mortgage debt, but all other debts he may owe the mortgagee, whether by bond or simple contract; the reason being, that as the legal title is in the mortgagee, by breach of the condition, the mortgagor will not be permitted to redeem until he has satisfied all the mortgagee's equitable demands; but on a bill filed by a mortgagee to foreclose the equity of redemption, only the money due on the mortgage can be demanded; *Walling v. Aiken*, 1 M'Mullan's Equity, 2, 10, 13. The rule was laid down in the same

way in *Lee v. Stone*, 5 Gill & Johnson, 1.

The doctrine that a mortgagor who seeks to redeem may be compelled to pay not only the mortgage debt, but debts secured by other mortgages, is recognized in Connecticut, 3 Day, 397; *Chamberlain v. Thompson*, 10 Conn. 251; *Rowan v. The Sharp's Rifle Man. Co.*, 29 Id. 282, 324, and it was applied in the case last cited as against a subsequent incumbrancer. See *Sampson v. Sutherland*, 13 Vermont, 309, *ante*.

In Pennsylvania, this species of tacking has been decided to have no existence, a mortgage in that State being a security for only the specific debt, and not capable of being used to secure any other debt; *Dorow v. Kelly*, 1 Dallas, 142; *Anderson and another v. Neff*, 11 Sergeant & Rawle, 208, 223. [In *Thomas' Appeal*, 6 Casey, 378, a mortgage given by two co-partners, of four lots of land, held by them as tenants in common, for a debt of the firm, was extinguished by the conveyance of two of the lots, in satisfaction of the debt, in pursuance of an agreement made with one of the partners, notwithstanding an oral stipulation that the lien should survive as security for a debt due by him in his individual capacity, which was said to be void as an attempt to create a mortgage merely by parol, and incapable of binding either his share of the land, or that of his co-partner.

It is, notwithstanding, well settled in Pennsylvania, that a collateral agreement, that a mortgage shall stand as a security for future

loans, is valid, not only as between the original parties, but as against third persons, whose liens attach before the money is advanced; at all events, where there is a binding agreement to make the advances, as well as that they shall be secured by the mortgage when made: *Lyle v. Ducombe*, 5 Binney, 585; *Parmentier v. Gillespie*, 9 Barr, 86; *Ter Hoven v. Kerns*, 2 Id. 96; *Moroney's Appeal*, 12 Harris, 372. In most of these cases, the agreement was in writing, and thus escaped the objection which might otherwise have arisen under the provisions of the Statute of Frauds; but there is no doubt that a mortgage may be shown to have been given as security for the payment of a note, or the performance of an obligation, other than, and differing from, the debt set forth in the bond, by oral testimony, and without the aid of written evidence: *The Bank of Utica v. Finch*, 3 Barbour's Chancery, 293; *The United States v. Sturges*, 1 Paine, 525; and if such an agreement is valid, when contemporaneous with the execution of the mortgage, it should be equally so at any subsequent period; *Robinson v. Urquhart*, 1 Beasley, 515, 524.

It should, moreover, be remembered, that to make payment an extinguishment, independently of intention, it must be at the day, and amount to performance; and that payment after the day will not satisfy a debt due by specialty, or even on simple contract, unless there is an express or implied agreement to receive it in satisfaction; *ante*, 130. See *Champney v. Coope*,

32 New York, 543; *Evans v. Wilcox*, 39, Barb. 136. When, therefore, one debt is substituted for another, with the express purpose of continuing the lien of a mortgage given as collateral security for the latter, and preserving it intact for the protection of the former, there is, obviously, no legal payment of the bond, and equity should not go beyond the law, except in furtherance of the intention of the parties, and the purposes of justice; *Hind v. Evans*, 1 Freeman's Chancery, 79; *The Bank of Utica v. Finch*, 3 Barbour's Chancery, 293. This view is sustained by the cases which establish that a mortgage may be a valid security for future advances, whether the agreement is set forth in, or evidenced by writing, or made orally, and proved by the testimony of witnesses; *Shiras v. Craig*, 7 Cranch, 34, 51; *Kendrick v. Robinson*, 2 Johnson's Chancery, 283, 309; *Brinkerhoff v. Marvin*, 5 Id. 320, 326; *James v. Johnson*, 6 Id. 417, 429; *The Bank of Utica v. Finch*, 3 Barbour's Chancery, 293; *Youngs v. Wilson*, 24 Barbour, 510; *Bell v. Hemings*, 1 Beesley, 13, 18; *The Commercial Bank v. Cunningham*, 24 Pick. 274. The fair deduction from these authorities, as a whole, would seem to be, that an agreement that a mortgage shall stand as security for a specific liability, or for the general balance of accounts between the parties, will be equally binding, whether it is made at the execution of the mortgage, or at any subsequent period, and will not lose its efficacy be-

cause one debt or security is put in the place of another, so long as it is apparent, that the object in view is a renewal or substitution, and not a payment; *Heard v. Evans*, 1 Freeman's Chancery, 79; *The Bank v. Finch*, *Dunham v. Dey*, 15 Johnson, 555; see *Fassett v. Smith*, 24 New York, 252. And such should clearly be the result where the defendant rests his case on the ground that the mortgage is a security for the payment or performance of a debt or obligation, not set forth on its face, or on that of the bond, because the defence is then a mere equity at variance with the letter of the agreement; and nothing is better settled than that an equity raised by parol may be rebutted in the same manner.

The better opinion would, however, seem to be, that to give a subsequent debt or advance priority over intervening incumbrancers, it must be made without notice of their equities; *Swigert v. The Bank of Kentucky*, 17 B. Monroe, 260, 289; *Brinkerhoff v. Marvin*, 5 Johnson's Chancery, 320, 327; *Shirras v. Craig*, 7 Cranch, 34, 51; or in pursuance of a binding agreement, which ties the hands of the mortgagee and renders it his duty to proceed without regard to third persons; and the cases of *Ter Hoven v. Kerns*, and *Moroney's Appeal*, establish that when the loan is discretionary, and not the result of contract or obligation, the record must be examined, for the purpose of learning whether any rights or equities have been called into being during the interval, which, being prior in

point of time, should also have a superiority of right; and that advances made without taking this precaution, will be postponed to an intervening judgment.

In *Townsend v. The Empire Stone Dressing Company*, 6 Duer, 208, an oral agreement that a mortgage which had been given to secure the faithful performance of a contract for the delivery of stone, should stand as security for another contract of the same nature, was held to be inoperative even as between the original parties, and not to make the fulfilment of the second contract a condition precedent to the exercise of the right of redemption, growing out of the performance of the first.

"It is urged by the plaintiff, and to a great extent with truth," said Hoffman, J., in delivering the opinion of the court, "that the doctrine of tacking is unknown to our law. When that doctrine is carried to the length of enabling a mortgagee to unite a third incumbrance to his own, to the prejudice of an intermediate mortgagee, of whose claim he is ignorant, our law condemns the rule. Other examples of the principle carried to an extremity clearly denounced in our tribunals, may be found in Mr. Powell's elaborate Treatise (on Mortgages, vol. 2, p. 423, etc.).

"But the question is different when the case is exclusively between a mortgagor and mortgagee, and especially when the mortgagor comes to ask for an assignment of his security. In this simple form, the right of the creditor to require payment of a further subsequent

claim was recognized by the Civil Law, (Code, 8, 27, 1; *Vide* Digest Lib. 13, 7, 8.)

"In *James v. Rogers*, (15 Mass. Rep. 3, § 9,) Justice Jackson, in an able opinion states, as the result of his examination of the Roman law, that a pledge might be retained, not only for the amount loaned upon it, but for all other moneys due to the pledgee on any account whatever. He cites Huber, *Praelections*, Heinecius, and the Code. Justice Wilde admits this to be the rule as to debts contracted after possession of the pledge, and so does Chief Justice Parker.

"Judge Story admits that the civil law authorizes a mortgagee to unite, as against his own debtor, a second loan without security to the first, when the debtor seeks to redeem; (Story's Eq. § 415, n. 2; *Ib.* 1010.) See also Domat, vol. 1, p. 348, art. 4, and the note.

"A somewhat similar doctrine is found in the French Code. A novation of the debt, as a general rule, extinguishes the hypothecation. But when it operates solely between the creditor and debtor, to whom the mortgaged property belongs, they can by contract, transfer the things mortgaged for the ancient debt to the new one. This works no prejudice to the other creditors, because it does not prevent them from seising the property, and selling it precisely as they might have done before the translation. The new obligation cannot exceed the old in amount, and it must be made at the time of the novation, not sub-

sequently. (Touillier Droit Civil Francaise, tome 7, arts. 308, 310, and note to 312.)

"In the earlier cases, in England, it was explicitly laid down, that a mortgagee coming to redeem, must pay any moneys subsequently advanced, as well as the original mortgage money. In *Demany v. Metcalf*, (Gilbert's R. 104,) this rule was stated in the analogous case of a pledge of jewels; and the Lord Chancellor stated his opinion to be that the rule would be applied to a mortgage of lands. In *Baxter v. Manning*, (1 Vernon, 244,) the point was decided in a case of a bond given for moneys subsequently advanced, and without any special agreement; *Halliday v. Kirtland*, (2 Chan. Rep. 361,) and the anonymous case, (3 Salkeld, 84, vol. 7,) are to the same effect.

"The case of *Coleman v. Winch*, (1 P. Wills. 775,) is generally cited by the text writers as reversing these decisions. But it is far from having that effect. An ancestor borrowed £100, and mortgaged lands to secure it; he afterwards borrowed £100 more upon bond; he died, and his heir conveyed the equity of redemption to trustees, to pay all his father's bond and simple contract debts. The trustees brought a bill to redeem, and the defendant insisted upon the right of having both debts paid. This was denied. But Lord Maclesfield expressly admitted, that if the heir had come to redeem, he must have paid both demands. The difference was, that the rights of creditors intervened in conse-

quence of the conveyance in trust by the heir.

"The same principle is found in *Lothian v. Hasset*, (3 Bro. Ch. Rep. 192.) There shall be no tacking as against other specialty creditors, where the suit is for administration of legal assets.

"I have examined a large number of subsequent authorities down to *Jones v. Smith*, (2 Vesey, Jr. 372, 1794,) in which case they are reviewed. Lord Alvanley states, as the result, that a bond may not be tacked to a previous mortgage, as against a mortgagor, nor against creditors, but may be against the heir, to avoid circuity of action. That if there are two mortgages to the same person of different estates, and one is deficient in value, the property can only redeem by paying both; and why a bond should not be upon the same footing, he did not know. It was impossible to say why a bond should not be tacked as well as a mortgage. The doctrine that two mortgages may be thus united upon a bill to redeem, is also recognized in the case of *Watts v. Symes*, (8 Eng. L. & Eq. Rep. 207.)

"There were several cases before Lord Eldon bearing upon the point. In *Ex parte Langston*, (17 Vesey, 228,) in bankruptcy, he held, that an equitable mortgage by deposit of deeds should stand for future advances, upon proof of a distinct agreement, though by parol, to that effect. In *Ex parte Waner*, (17 Vesey, 202;) *Ex parte Whibread*, (Ib. 209,) and *Ex parte Kensington*, (2 V. & Bea. 79,) the same rule was declared.

In the latter case, he expressed his strong disapprobation of the doctrine.

"Then in *Ex parte Hooper*, (19 Vesey, 477; 1 Merivale, 7,) he expressly ruled, that where there was a legal mortgage, it could not be rendered a security for subsequent advances, upon parol evidence of an agreement to that effect. It would be a violation of the Statute of Frauds, requiring a writing to change lands.

"In *Diver v. M'Laughlin* (2 Wendell, 599,) the law is stated in the same manner; as also in *Walker v. Snediker*, (1 Hoffman's Rep. 147,) and Chancellor Kent treats it as the settled English rule, (Com. vol. 4, p. 176.)

"In *Rolfe v. Chester*, (25 L. J. R. p. 246, 1854,) the right of a mortgagee to have a simple contract debt tacked as against the heir, was admitted, simple contract debts now binding real estate. In *James v. Rice*, (27 L. and Eq. Rep. 342; 5 De Gex and M'Naughton, 461,) deeds had been placed in the hands of the plaintiff, as security for a promissory note, and upon a further advance, the party promised to execute to the lender a mortgage for the whole amount. This was held binding. See, also, *Uppington v. ———*, (2 Drury and Warren, 184.)

"Some cases in our own State bear upon the question; *Grant v. The United States Bank*, (1 Caines' Cases in Error, 112,) and *James v. Morey*, (6 John. Ch. Rep. 420, and 2 Cowen, 247.) Justice Willard treats, *James v. Morey*, as estab-

lishing this proposition, 'that if a deed, absolute in its terms, be intended as a mortgage, and it be shown by parol to be also intended as a security for further advances, it will, as between the parties, be treated as a mortgage for the subsequent advances as well as the original debt.' (Eq. Jur. 436.)

"That this proposition is warranted by the opinion of Chancellor Kent, when the cause was before him, cannot be disputed.

"But in the Court of Errors, Justice Woodworth, after examining various cases, says, 'They show conclusively that the respondent cannot divert the securities taken, from the object specified, when it formed no part of the original agreement, nor was ever assented to subsequently by Wattles, (the debtor) and particularly when an objection is interposed by a *bona fide* creditor, holding a judgment made valid by an amended specification.

"This question was considered as of so little moment in the decision of the cause, that neither of the other judges or senators notice it in their opinions, or only to pass it over. As to decisions in some other States, see *Scripture v. Johnson*, (3 Conn. Rep. 211,) and *Chamberlain v. Thompson*, (10 Conn. 251,) allowing the union of demands upon a bill to redeem. So in Maryland, (*Lee v. Stone*, 5 Gill & Johnson, 22.)

"Another class of cases may usefully be adverted to. In *Walker Snedaker*, (Hoffman, Rep. 146,) I observed, that it appeared to be the better opinion, if not the set-

tled law, that a mortgage which was to cover future advances, ought to express the object on its face. In *Craig v. Tappin*, (2 Sand. Ch. Rep. 82,) Assistant Vice-Chancellor Sanford, came to a different conclusion after examining the authorities, and held, that it was enough that the mortgage show upon its face the utmost amount which it was intended to secure; and up to that amount it would be valid for future advances, when such was part of the original agreement.

"In *The Bank of Utica v. Finch*, (3 Barbour's Ch. Rep. 204,) Chancellor Walworth declares the rule to be, that future advances may be covered by a mortgage to the extent of the sums mentioned in it. He says, 'that parol evidence is admissible, not to contradict the written instrument, but to show the purpose and extent for which it was executed. It was admissible to show that credit had been given to Finch upon the several discounts for him on the faith of the mortgage, and that it was treated by the complainants as a continuing security. Here is a mortgage, the record of which is a notice to all of an incumbrance to the extent of \$30,000, and I suppose the holder of that mortgage may advance upon it up to that amount, and may be secure in his lien to the extent of his advance within that amount, such having been the agreement between himself and the mortgagor.'

"In such a state of the authorities, we are at full liberty to determine the question untrammelled

by peremptory decisions. We cannot but conclude that parol evidence of an agreement, by which a mortgage given to secure a definite sum, shall operate to secure a further sum subsequently advanced, contradicts the rule, that such evidence shall not be allowed to add to the terms of a written instrument, and would, in effect, charge lands without an instrument in writing, signed by a party competent to charge them; (2 R. S. 134, § 6.)

"The English authorities are of various classes. One is of bills to redeem, where the forfeiture being perfect at law, the court has refused its interference but upon payment of other demands justly due. This was held in the early cases, but it is very doubtful if it is now the law.

"Another class is of mere equitable mortgages, where the whole principle is the intendment resulting from the advance and deposit deeds. This peculiar equity is, perhaps, unknown in our State, probably from the operation of the registry acts.

"A third class is, where the question is between the heir or devisee and mortgagor; then, when there are legal assets, a bond creditor heretofore and lately a simple contract creditor, may unite his demands. The reason is, that the land has become subject to a lien in his favor.

"The union of one mortgage debt to another mortgage debt, as against the mortgagor, rests upon the same principle of a charge on the land.

"As to the decisions in our own State respecting the extension of a mortgage, so as to cover future advances, I understand it to be the law, that they never can exceed the sum stated in the mortgage, and I understand it not to be the law of any case, that if such sum was unpaid, the mortgage could, by parol, be extended to an additional sum.

"Thus understood, there is a lien created for a definite sum, the advance of which may be made in different amounts at different times. This is a very different case from that of the original debt unpaid, and a parol agreement to charge the mortgaged land with another sum.

"The result in our judgment is, that the defendants are not entitled to hold the mortgage as security for the amount of the subsequent extra supplies and labour."

All the authorities concur that a mortgage may be valid although value is not given or received. A post-nuptial settlement, made in that shape, would be binding not only on the donor, but on subsequent creditors and purchasers, unless it exceeded a just provision for his family. Want of consideration, without more, does not invalidate an instrument under seal, either as it regards the parties or third persons.

It results *a fortiori* that a mortgage to secure future advances is obligatory on the mortgagor, and third persons, whose equity is not superior to his. The bond is a legal obligation, and chancery will

not relieve except on the terms of repaying all that has been received, without regard to date. The rule was laid down by C. J. Gibson, in *Irwin v. Tabb*, 17 S. & R., in the following terms: "As against the mortgagor, the defendant below would undoubtedly be entitled to his whole debt. The sum at which it was fixed in the mortgage, is due at law, and chancery would relieve from it only on doing complete justice, by payment of whatever was received on the credit of the mortgage, without regard to date." "It is only where the rights of third persons are prejudiced by want of notice," says Chancellor Kent in *James v. Johnston* (6 Johns Ch. 429), "that the extension of the security is prevented;" and again, in *Brinkerhoff v. Marvin* (5 Johnson, Ch., 327), "the limitation to this doctrine, I should think, would be, that when a subsequent judgment or mortgage intervened, further advances after that period would not be covered." In *Lyle v. Ducomb* (5 Binn. 585), Chief Justice Tilghman maintains the converse of the proposition, saying, that third persons who cannot be prejudiced, have nothing to do with the transactions between the mortgagor and mortgagee. Let us see then whether the plaintiff has an equity distinct from that of the mortgagor and superior to that of the defendant, for if it be only equal, the law must prevail."

It results from these principles, that an advance on a prior mortgage will not be postponed to an intervening incumbrance, unless

there is some want of equity on the part of the mortgagee, which cannot be said where the loan is made in pursuance of an antecedent stipulation, which must be fulfilled at the risk of an action for damages.

Hence, all the authorities agree that where the mortgagee assumes a liability on behalf of the mortgagor, or enters into a binding agreement for a future advance, it is immaterial that nothing is paid at the time; *Griffin v. The New Jersey Oil Co.*, 3 Stockton, 49; *Ball v. Fleming*, 1 Beasley, 13; *Ward v. Cooke*, 2 C. E. Green, 93; *Terhoven v. Kerns*, 2 Barr, 96; *Moroney's Appeal*, 12 Harris, 372; *Robinson v. Williams*, 22 New York, 380; *Murray v. Barney*, 34 Barb. 336. This is true not only as between the parties, but as it regards creditors and purchasers, whether their rights attached before or after the money was actually paid. Such is the ordinary case of a mortgage to indemnify a surety or endorser, or that a credit given absolutely shall be repaid. Under these circumstances, there is an immediate obligation, although it is not to be fulfilled until a future day. If A. mortgages his estate to secure B. from a liability assumed at his instance, the lien is obviously good, and it does not vary the principle that the advance is to be made to the mortgagor, although equity might enjoin him from receiving it when the effect would be to defeat an intervening incumbrance. In the language of C. J. Gibson, such a contract is a pre-

VOL. I.—55

sent loan in everything, except the manucaption of the money; *Parmentier v. Gillespie*, 9 Barr, 84. In *Moroney's Appeal*, land was sold and conveyed, with an agreement on the part of the grantor to make an advance, and on that of the grantee to employ the money in erecting houses on the premises, and it was held that a mortgage for the price and to secure the repayment of the loan, had priority over the claims of the mechanics and material men.

It was said in like manner in *Burdett v. Clay*, 8 B. Monroe, 291, that a mortgagee who endorses bills in blank, and takes a mortgage as an indemnity, is entitled to priority over a subsequent mortgage of the same property, although made before the bills are negotiated or put in circulation. The subsequent incumbrancer had no right or power to prevent the mortgagor from circulating the bills. The rule is the same in New York, and generally in the other States, *ante*. See *Truscott v. King*, 6 Barb. 346; 2 Selden 147; *Stewart v. The Bank of Kentucky*, 17 B. Monroe, 216. Reasoning logically from these premises, the effect should be the same, whether the advance is voluntary or in pursuance of a covenant. In either case the mortgagee has the legal title, and equity should not deprive him of it until he is paid in full. Such is the well settled rule in England, and it prevails in Maryland, New Jersey and Kentucky, and in the Supreme Court of the United States; *Truscott v. King*, 6 Barb. 346; 2 Selden, 147; *Griffin v. The*

New Jersey Oil Co., 3 Stockton, 9; *Bell v. Fleming*, 3 Beaseley, 13; *Ward v. Cooke*, 2 C. E. Green, 93; *Stewart v. The Bank of Kentucky*, 17 B. Monroe, 269.

These decisions follow the leading case of *The United States v. Hooe*, 6 Cranch, 73. There, one Fitzgerald executed a bond with Hooe as his surety, and being desirous to procure Hooe's signature to certain notes which he proposed to issue as a means of raising money, conveyed land in trust to indemnify Hooe against the bond, and such notes as he might endorse for his accommodation. The court held that the mere circumstance that the deed was executed to secure future advances, did not constitute a ground of exception. Such an instrument might be used for improper purposes, but it was not positively inadmissible. It constantly happened that a person who expected to become more considerably indebted, mortgaged his property for what he might subsequently borrow, as well as for the amount already due. It was decreed in like manner in *Shirass v. Craig*, 7 Cranch, 34, that the mortgage should stand as a security for the whole amount due to the mortgagee, whether the debt existed at the date of the instrument, or arose afterwards and before notice that the defendants had bought the premises.

So, in *Nelson's Heirs v. Boyce* (7 J. J. Marshall, 401), "a recorded mortgage to indemnify against future securityships, to be undertaken by the mortgagee at the request of the mortgagors, was held

to be valid, and to afford effectual indemnity for a future securityship entered into after the mortgagor had sold the estate to another, but without actual knowledge of that fact by the mortgagee; *Burdett v. Clay*, 8 B. Monroe, 291; see *Boswell v. Goodwin*, 31 Conn. 74."

It seems, said Sanford, J., in *Boswell v. Goodwin*, "to be settled by a series of adjudications, that mortgages given to secure advancements to be made to the mortgagor, or liabilities to be assumed for him by the mortgagee in future, are to be upheld and enforced against subsequent purchasers, mortgagees and attaching creditors, even where the registration of deeds and mortgages is required by law; *Crane v. Deming*, 7 Connecticut, 387; and although it is optional with the mortgagee whether he will make such advancements or assume such liabilities or not, provided they are made and assumed in good faith, and without notice of the subsequent intervening incumbrance; *M'Daniel v. Calvin*, 16 Vermont, 300; *Shiras v. Craig*, 7 Cranch, 34; Story, J., in *Conard v. Atlantic Ins. Co.*, 1 Peters, 655; *Truscott v. King*, 6 Barbour, 346."

It is equally well settled, that if the mortgagee has actual or constructive notice that other liens have attached, and will be prejudiced if he makes a further advance, it is incumbent on him to refrain; and he cannot proceed without the risk of being postponed to the party whom his conduct has a tendency to injure. It was indeed held at one period, that

as the second mortgagee takes subject to the sum named in the bond, it is immaterial whether the money is paid at the time or afterwards, *ante*; but this is a technical view of the question, which overlooks that each one should exercise his right with a due regard to the rights of others. It was accordingly disapproved in *Blunden v. Desart*, 2 Drury & W. 405; 25 Beavan, 466; and when the point arose in *Hopkinson v. Rolt* and *Dann v. The City of London Brewery Co.*, 8 L. R. Equity, 155, the Court held that a mortgagee, who goes on voluntarily to charge the land after notice of an intervening incumbrance, must bear the loss if the estate proves inadequate. The rule had been established on this basis in New York, at an earlier period, by the just and sagacious intellect of Chancellor Kent, and it now prevails throughout the United States, with the exception of Maryland; *Roswell v. Goodwin*, 31 Conn. 81; *The Bank of Montgomery v. Walker*, 12 Casey; *Spader v. Lawler*, 17 Ohio; *Truscott v. King*, 6 Barb. 346; 2 Selden, 147.

It results from what has been said, that priority depends in general on the execution and recording of the instrument, and not on when the loan is actually made. The first mortgagee will not be postponed to a second, unless the latter has a superior equity to make up for the want of the legal title. A senior lien creditor should not arbitrarily adopt a course calculated to render a junior lien un-

availing as a means of security or payment. The rule is a general one, applying under a great variety of circumstances; *post*, vol. 2, notes to *Aldrich v. Cooper*; but the obligation does not arise unless he is apprised of the junior lien. No one can be in default for regarding a right of which he is ignorant.

The better opinion seems to be, in accordance with this reasoning, that the holder of a mortgage given to secure future advances, may disregard subsequent incumbrances, unless he has actual notice of their existence; *Rowan v. The Sharps' Rifle Co.*, 29 Conn. 282. If the holder of a second mortgage wishes to be secure, he should warn those who precede him on the record. This is well settled where a mortgagee or judgment creditor exonerates part of the land from the burden of the debt, and there is no substantial difference between such a case and that of a loan on the faith of a prior mortgage. The law is so held in Connecticut, New Jersey and Kentucky, and, as it would seem, by the Supreme Court of the United States.

Notwithstanding the weight of these considerations, the inclination of the courts in many of the states is the other way, and towards the position that a mortgage does not acquire validity as such, until a consideration moves from the mortgagee. This may be in the form of value actually given, or of an agreement to give value, from which he cannot recede. In either case there is a debt actual

or potential, and this is enough to satisfy the rule.

Where, however, there is no mutual obligation, the mortgagee being free to withhold, and the mortgagor to reject the loan, the transaction is regarded as inchoate, and will be postponed to liens attaching subsequently to the execution and recording of the instrument, but before the actual passage of the consideration, *ante*.

It is immaterial, according to these decisions, that the mortgagee is ignorant of the intervening incumbrance, and believes the way to be entirely clear, because it is his duty to consult the record, and take every precaution that would be requisite if he were taking a new security instead of trusting to one already given. The law was so held in *Terhoven v. Kerns*, 2 Barr, 96; *The Bank of Montgomery County's Appeal*, 12 Casey, 172; *Spader v. Lawler*, 17 Ohio, 370, and *Frye v. The Bank*, 11 Illinois, 369; and in *Boswell v. Goodwin*, 31 Conn., 74, the court inclined in this direction although, the point was not determined.

In *The Bank of Montgomery County's Appeal*, judgment was delivered by Read, J., in the following terms: "The object was therefore to secure not only present, but future advances by the Bank of Montgomery County, which future advances they were under no contract to make, but which it was at their own option to make or not, as they thought proper. As to future advances, therefore, and as against other mortgages and judgments, this

mortgage only took rank from the date of such advances, and not from its own date."

"Our own cases, and particularly that of *Terhoven v. Kerns*, 2 Barr, 96, show conclusively that this is the law. The case of *Roll v. Hopkinson*, 4 Jurist. (N. S.) 919, decided by the Master of the Rolls on the 29th May, 1858, and, affirmed on appeal by the Lord Chancellor, on the 9th November, 1858, Id. 1119, is directly in point, for the language of the stipulation in the prior mortgage is substantially the same as in the present case. There, both the first and second mortgages had notice of each other, and the advances were made by the prior mortgagee, after the date of the subsequent mortgage, and with full knowledge of it; and it was held that the subsequent mortgagee was entitled to priority for his advances, made before the advances by the prior mortgagee, with full knowledge of his security."

"This solemn decision, with the case of *Shaw v. Neale*, 20 Beavan, 166; 6 House of Lords Cases, 581, entirely overrule the anomalous case of *Gordon v. Graham*, 2 Eq. Cas. Abr. 598, before Lord Cowper. In Pennsylvania, a first mortgagee thus situated, is bound to take notice of junior and intervening recorded incumbrances, in the same manner as if he were about to accept of a new and independent liability from the party having no reference whatever to any prior incumbrance; 2 Barr, 99."

In the *Appeal of the Bank of Commerce*, 8 Casey, a mortgage in

trust to secure notes discounted, or to be discounted for the accommodation of the mortgagor, was in like manner postponed to a judgment obtained subsequently to the execution of the instrument, but before the notes were actually discounted by the bank. The credit in this instance seems to have been a continuing one, and as it was anterior to the judgment, we may doubt whether the principle was correctly applied. It is well settled that where a loan has been made on the faith of a mortgage or judgment, it may be renewed from time to time without losing the benefit of the lien or postponing to subsequent incumbrances. See *Gault v. McGrath*, 4 Casey, 392.

It seems to have been thought in some instances, that the record of a second mortgage is notice to the holder of the first; *Loder v. The R. R. Co.*, 13 Michigan, 380; but this opinion is untenable; *Hog v. Bramhall*, 4 C. E. Green, 563; *Iglehart v. Crane*, 42 Illinois, 261; *Truscott v. King*, 6 Barb. 346; 2 Selden, 160, and the true ground of the decisions is, that until value is given in some form, there is no lien as it regards third persons.

On the other hand, in *Wilson v. Russell*, 13 Maryland, 495, the court went to the full extent of *Gordon v. Graham*, that an advance on the faith of an antecedent mortgage, is to be paid in preference to an intervening incumbrance, although merely voluntary, and not made in the pursuance of a contract. In *Rowan v. The Sharp's Rifle Manuf. Co.*, 29 Conn., 282, land was conveyed

to the respondents to secure the fulfilment of an unrecorded instrument, wherein it was agreed that in consideration of \$45,000 advanced by the grantees, the grantor would manufacture and deliver 20,000 rifles, at a price fixed by the contract. The question was, whether the grantees were entitled to hold the land as a security for a further sum which they had advanced, with notice of an intervening mortgage, for the purpose of enabling the grantor to carry out the agreement.

The court said that although the respondents were not legally bound to advance more than the \$45,000 originally stipulated, they were still in a position in which, if they did not do so, there would be a failure of the object for which the deed of trust was executed. The whole was virtually one transaction, relating back to the execution of the deed, and antedating the mortgage. If the trust was designed as an indemnity against any loss that might arise from the non-performance of the contract, this decision is entirely just.

In *Stoddard v. Hart*, 23 New York, 557, money was advanced upon the security of a mortgage, with a parol agreement that further advances should be made, that the amount thereof should be noted in the bond, and that the mortgage should stand as security for the full amount, as thus authenticated. After the mortgage was recorded, a further advance was made, and the amount inserted in the bond; and it was held that the mortgage did not

cover such subsequent advance even as against a grantee who took the premises for a precedent debt, and with full notice of all the circumstances. It was conceded that the result would have been different if a mortgage passed the legal title in New York, as it does in England, Pennsylvania, and Massachusetts.

It is well settled in the United States, that payment discharges the lien of a mortgage *ipso facto*, without a release or reconveyance; *Truscott v. King*, 6 Barb. 346, 2 Selden, 147; *Merrill v. Chase*; *Griffin v. Lovell*, 42 Mississippi, 402; and the weight of authority seems to be that the mortgage cannot be kept alive by an oral agreement that it shall stand as security for another debt; *Mead v. York*, 2 Selden, 449; *Merrell v. Chase*, 3 Allen, 339; *Thomas' Appeal*, 6 Casey, 378; *Appleton v. Angier*, 46 Missouri, 515. The rule was applied in *Mead v. York*; and when a similar question arose in *Truscott v. King*, the court held that a judgment confessed to secure a future advance became *functus officio*, as it regarded an intervening incumbrance, when the loan was repaid, and could not stand as a security for a further credit or the final balance of accounts between the parties.

The same doctrine prevails in Massachusetts; *Holman v. Bailey*, 3 Metcalf, 55; *Claflin v. Godfrey*, 21 Peck, 11; *The Bank v. Foster*, 11 Gray, 265; *Merrill v. Chase*, 3 Allen, 399; and was enforced in favor of the mortgagor, in *Merrill v. Chase*, although a third per-

son had given value for the mortgage on the faith of the agreement. Hoar, J., said, "it is conceded that the note was paid at or before maturity, but the demandant relies on a parol agreement that the mortgage should continue as a security for future advances, and that it was assigned to him under that agreement with the knowledge of the mortgagor as a valid instrument. The difficulty of supporting such an argument is that a conveyance of land by mortgage is a conveyance by deed defeasible on a condition subsequent. By the performance of the condition, the title of the mortgagee is defeated, and the mortgagor is in of his old estate."

As thus stated, the argument applies whether the subsequent agreement is in writing or merely oral. It was said with more accuracy, in *Thomas' Appeal*, that as a mortgage affects, and, for some purposes, passes the title to land, it can neither be created nor revived by word of mouth consistently with the provisions of the Statute of Frauds.

It is not easy to reconcile this course of decision with principle. The payment of the mortgage debt does not divest the title of the mortgagee, it simply renders it his duty to reconvey, unless, which seldom happens, it is in full, and made at the day; *Stewart v. Crosby*, 5 Maine, 130. It is true, that under the equitable rule that what ought to be done shall be considered as done, this formality is dispensed with in the United States, and an entry of satisfaction con-

sidered as equivalent to a deed, but this does not affect the principle. If it is agreed that the mortgage shall stand as a security for a collateral obligation or fresh advance, this equity will not arise in opposition to the good faith of the transaction, which requires that the mortgagee should not be called on to relinquish his hold on the land until he is fully paid. It matters not that the new or substituted agreement is dehors the mortgage and not under seal, because an equity may always be rebutted by parol. In every such case, regard should be had to substance rather than form. It is not denied that one of two or more joint mortgagors may be exonerated by an agreement to that effect, without discharging the rest, and there is no material difference between such a case, and that where the debt is paid by one, and the money handed over to the other, on the faith of the original security, *ante*.

The argument may be stated in another form. It is conceded that an absolute deed may be turned into a mortgage by oral evidence that it was made as security for a loan, or the fulfilment of an agreement of any other description. This is not at variance with the statute of frauds, or the rules of the common law, because the mortgagor's equity is not founded on contract, and would arise, although it were expressly stipulated that he should not redeem. It follows that if the original agreement be varied or enlarged, the equity will undergo a corresponding change. A writing under

seal is requisite to pass the estate in the land, but this once done, the parties may attach any condition to the right of redemption that is not at variance with good faith and fair dealing. They may abridge or extend the time of payment—agree that the debt shall be paid in goods; or that it shall be increased by a further loan. So the original indebtedness may be paid and another put in its place. Such a new or substituted agreement does not operate on the land, except incidentally by modifying the equity of the mortgagor to have the premises restored to him on payment. In other words, the debt is the principal, the mortgage a mere accessory, and what the debt is, depends not merely on the original contract, but on every subsequent transaction by which it has been changed or modified. See *James v. Morey*, 6 Johnson, Ch. 428, 2 Cowen; *Swigert v. The Bank of Kentucky*, 17 B. Monroe, 268; *Large v. Van Buren*, 1 McCarter, 208; *Bailey v. Myrick*, 50 Maine, 171.

There is no doubt that an agreement in writing to revive a mortgage which has been paid, or that it shall stand as security for a different debt or new advance, is good as between the parties; *James v. Morey*, 2 Cowen, 247; *Power v. Anderson*, 4 Edwards, Ch. 17; and against purchasers and incumbrancers with notice; *Flanagan v. Westcott*, 3 Stockton, Ch. 264; *Swigert v. The Bank of Kentucky*, 17 B. Monroe, 268. This was tacitly conceded in *Thomas' Appeal*, 6 Casey, 378, and would

hardly be denied in Massachusetts, notwithstanding the language held in *Merrill v. Chase*, *ante*. The statute of frauds does not apply under such circumstances, and it is well settled, that equity will enforce a specific appropriation, whether the subject-matter is land or chattels. Such an instrument may be regarded as new security, or as reviving that originally given. In either aspect, it is an equitable mortgage, which takes effect, as it regards third persons, from the period when it is recorded or brought home to them by notice.

Although a mortgage cannot be created orally in the United States, see *James v. Morey*, 6 Johnson's Ch. 417, 2 Cowen, it is well settled that the parties may go outside of the writing for the purpose of showing the true character of the transaction. This results from the equity of the mortgagor to redeem on the payment of principal and interest, notwithstanding anything to the contrary in the wording of the instrument, which involves a right on his part to define the nature and extent of the liability by any means of proof, and on that of the mortgagee to controvert the testimony thus adduced. It may consequently be shown, that there is no such debt as that named in the bond, and that the mortgage was given to secure future advances, or as an indemnity against a contingent demand which has not become absolute; *Tally v. Harloe*, 35 California, 302; *Truscott v. King*, 5 Barb. 346; 2 Selden, 147. The lien cannot be carried beyond the sum des-

ignated in the instrument, but as to all else, it is merely *prima facie* evidence. A mortgage purporting to be for one liability, may cover another differing in the nature of the consideration, in the time of payment, and in amount. So a mortgage nominally for an executed consideration, may be shown to have been given to indemnify the mortgagee against a note which he has made or endorsed for the accommodation of the mortgagor. The explanation of this seeming anomaly is, that the mortgagor must seek equitable relief against the estoppel of the seal, which throws the whole case open to parol evidence. It were obviously unjust to permit him to show that he does not owe the amount set forth in the bond without suffering the mortgagee to allege the collateral obligation which the instrument was really intended to secure. See *Irwin v. Tabb*, 17 S. & R. In *Shiras v. Craig*, 419, *ante*, 866, the mortgage was nominally given for a debt of thirty thousand pounds sterling, due to all of the mortgagees; but was really intended to secure different sums, due at the time to particular mortgagees; and advances afterwards to be made, and liabilities to be incurred to an uncertain amount. Marshall, C. J., said, it was true that the real transaction did not appear on the face of the instrument, and it could not be denied, that a deed which misrepresented the facts which it professed to recite, and the consideration on which it was based, was liable to sus-

picion, and must sustain a rigorous examination. It was always advisable fairly and plainly to state the truth. But if upon investigation, the real transaction should appear to be fair, though somewhat variant from that which was described, it would be unjust and unprecedented to deprive the person claiming under the deed, of his real equitable rights, unless it were in favor of some one who had been in fact injured and deceived by the misrepresentation. It was decided in like manner in *Lyle v. Ducomb*, 5 Binney, 585, that the operation of a mortgage might be controlled or varied by a memorandum endorsed on the bond, but not recorded nor under seal, without invalidating the security, as it regarded the parties or third persons. In *Moroney's Appeal*, 12 Harris, 372, Lowry, J., said that *Lyle v. Ducomb* had never been questioned, and was followed throughout the United States. So a collateral agreement that a bond nominally for a sum certain, should stand as security for advances which the obligee covenanted to make, was held not to be a ground for postponing the mortgage to a subsequent judgment, notwithstanding the objection that the instrument as recorded did not accurately express the contract. The doctrine of *Shiras v. Craig*, was also recognized and approved in *Lawrence v. Tucker*, 23 Howard, 142; and *Robinson v. Williams*, 22 New York, 580.

However true this may be on general principles, it is still subject to qualification. The chief

object of the registry acts is to afford information to creditors and purchasers. It were useless, so far as they are concerned, to record an instrument which does not express that which it is most important for them to know. A mortgage should consequently define the nature and extent of the obligation which it is intended to secure. Entire certainty may not be attainable when advances are to be made at a future day, and the borrower does not know what his necessities will require. But while the real debt need not be set forth, some amount must be named, which it will not exceed. *Hart v. Chalker*, 14 Conn. 79; *Pettibone v. Griswold*, 4 Id. 58; *Babcock v. Bridge*, 29 Barb. 427; see *Craig v. Tappin*, 2 Sandford, Ch. 78. So a failure to state an existing debt with a reasonable degree of accuracy may justly be imputed to negligence, or a design to mislead. In *Youngs v. Wilson*, 24 Barb. 510, a mortgage not setting forth any precise sum, and purporting to be for any liabilities due, or to become due, which the mortgagee had at any time assumed for the mortgagor, was held to sin against this rule, and be constructively if not actually fraudulent as it regards subsequent incumbrancers; see *Truscott v. King*, 2 Selden, 147, 161. It was said on the other hand, in *Bell v. Fleming*, 1 Beasley 13, 494, that if the record discloses the existence of the incumbrance, and specifies an amount which the creditor cannot exceed, the object of the law is satisfied, and nothing more is requisite.

The decision in *Youngs v. Wilson*, was subsequently reversed; and it is now established in New York that a mortgage to secure past or future advances may be valid although it does not specify any limit or amount: *Youngs v. Wilson*, 27 New York, 351; *Robinson v. Williams*, 23 Id. 380; and the cases of *Roosevelt v. Mack*, 6 Johnson, Ch. 266; *Kramer v. The Trustees*, 13 Ohio, 253; *Louis v. De Forest*, 20 Conn. 442; and *Ketchum v. Janney*, 23 Id. 127, proceed on the same ground.

Notwithstanding the somewhat narrow view prevailing in the United States, a mortgage is not necessarily extinguished by the payment of the sum named in the bond. Payment is a question of intention, and where it appears from the assignment of the instrument to a third person, or the other circumstances of the transaction, that the design was to buy the security, and not to satisfy it, the lien will remain, notwithstanding the receipt of the full amount of the debt by the mortgagee; *Cole v. Edgerly*, 48 Maine, 108; *Angel v. Boner*, 38 Barb. 425; *Grimes v. Mumford*, 26 Id. 95; *Hoy v. Bramhall*, 4 C. E. Green, 74, 563; *Graves v. Mumford*, 26 Barb. 94; *Kellogg v. Ames*, 41 New York, 259; *White v. Knapp*, 8 Paige, 173. Payment by a surety operates as a purchase *prima facie*, and unless it is shown that the intention was to divest the lien; *Murray v. Catlett*, 4 Green 108; *Dunn v. Seymour*, 3 Stockton, 278. And the same result will ensue when the money is paid by

the mortgagor, and the mortgage assigned to a third person for his use; *Champney v. Coope*, 32 New York, 543; *Cole v. Edgerly*; or by a third person who takes an assignment of the mortgage; *Murray v. Catlett*, 4 Green, 108; *Dunn v. Seymour*, 3 Stockton, 278. See *Kellogg v. Ames*, 44 Barb. 218; although a principal debtor cannot by any device of this kind keep the lien alive in fraud of the surety; *Dunn v. Seymour*. To render a payment by a stranger satisfaction, it must be made for or on behalf of the debtor, and ratified by him; *ante*, 151, 2 Am. Lead. Cases, 280, 5th ed. But it is also true that such a payment cannot operate as a purchase, unless the creditor agrees to sell, which will not be presumed from the mere circumstance of his accepting the money, in the absence of proof that it was so agreed; *Pellon v. Knapp*, 21 Wisconsin, 63.

Accordingly, where a third person paid part of the debt at the instance of the mortgagor, without taking an assignment of the mortgage, it was held, that he did not thereby acquire any right as against a subsequent mortgagee; *The Commonwealth v. The Chesapeake and Delaware Canal Co.*, 32 Md. 501.

That the means are furnished by a third person, who is interested in keeping the debt alive, will not, of itself, and without more, convert a payment into a purchase; *Wiley v. Boyd*, 38 Alabama, 625. A tender of the amount due, and the acceptance of it by the creditor, extinguishes the debt, unless something is said or done to keep

it alive, or there is a well defined equity, as in the case of a surety; *ante*, 146. See *Virginia v. The Chesapeake and Ohio Canal Co.*, 32 Maryland, 498, 546. But when the intention plainly is that the security shall survive as a means of re-imbursement, it will not fail, because the money is loaned to the debtor, and handed over by him to the mortgagor. See *Hoyt v. Branhill*, 4 C. E. Green; *White v. Knapp*, 8 Paige, 173.

It is generally conceded that the lien of a mortgage is not impaired by taking another bond or note for the debt, or extending the time for payment; *Taft v. Boyd*, 13 Allen, 84; *Chase v. Abbott*, 20 Iowa, 54; *Bailey v. Myrick*, 50 Maine, 171. *Prima facie* the object of such a transaction is to afford an additional or collateral means of payment, and it will not operate as satisfaction, unless the parties so agree, which will not be presumed in the absence of proof. This is true, even when the new security bears the name of a third person as maker, obligor, or endorsee; 2 Am. Lead. Cases, 276 5th ed; or as the rule was laid down in *Pomeroy v. Rice*, 16 Pick. 22, and *Fowler v. Buck*, 21 Id. 239, a mortgage will remain in force as long as the debt or obligation which it was intended to secure, subsists, notwithstanding any formal change. The creditor may consequently take a new note and mortgage without being postponed to intervening incumbrances; *Cessna v. Haines*, 18 Indiana, 496; *Williams v. Kerr*, 5 Wisconsin, 534; *Taft v. Boyd*; and the

principle is the same where a note secured by a mortgage is renewed, because the debt remains, although in another form; *Parkhurst v. Cummings*, 56 Maine, 155; *The Bank v. Finch*, 3 Barb. Ch. 393; *Dunham v. Day*, 15 Johnson, 555; *Bolles v. Chauncey*, 8 Conn. 389; *Pond v. Clark*, 14 Id. 334. Hence, a mortgage executed as an indemnity for the liability incurred by an endorsement, may extend to a note given to take up the first, and so on indefinitely through a series of renewals; *Boswell v. Goodwin*, 31 Conn. 74. Whether a note is a renewal, or a new debt, was said in *The Appeal of the Bank of Commerce*, 8 Wright, 422, to be a question of fact not depending on intention; but it would seem that where there is no new consideration, the question is so far one of intention, that the debt will not be discharged without an agreement to that effect. Renewal is a commercial rather than a legal term, which does not admit of a precise definition: *Gault v. McGrath*, 8 Casey, 293; *Russell v. Phillips*, 14 Q. B. 899. All that such a substitution necessarily imports is an extension of the time of payment; and although the surrender of the former note may be evidence that it has ceased to be a valid cause of action, it should not readily be presumed that this breaks the thread of the obligation, or renders the mortgage unavailable for the purpose it was intended to subserve.

Accordingly, where a mortgage was given to secure the payment of certain promissory notes made by the mortgagee for the accom-

modation of the mortgagor, and the renewals of those notes, from time to time, until the whole should be finally paid, the Court said that a note might be a renewal, and as such, entitled to precedence over an intervening incumbrance, although differing in amount, and applied to take up its immediate predecessor. A continuing loan, by the issue of new notes from time to time, in pursuance of the original credit, was accordingly held to be within the terms of the mortgage between the parties, and as it regarded creditors and purchasers; *Gault v. M'Grath*, 8 Casey, 392.

The material inquiry, is the debt the same, seems to be one of fact, depending on whether the new security is based on the original consideration. If it is, it should be regarded as collateral to or a renewal of the principal obligation, and within the scope of the mortgage. This may be true, although the note or bond which accompanied the mortgage is surrendered and another substituted. Such a satisfaction does not extinguish the debt; and it is the debt, and not the securities given for the debt, which the mortgage is designed to protect; *Roxheimer v. Greene*, 24 Mich. 372.

It results from what has been said, that a mortgage given to indemnify the mortgagee from loss of damage by reason of a note which he has indorsed for the accommodation of the mortgagor or a third person, will not be discharged by the substitution of a new note by way of renewal, or even

by taking up the original security, with funds procured on the credit of the mortgagee, because the change is merely formal, and the substance of the transaction remains the same; *Chase v. Ridgely*, 7 Harris & J. 170; *Markell v. Eichelberger*, 12 Maryland, 78. The debt may be gone at law, but the mortgagee is equitably entitled to enforce the lien as a means of reimbursement.

The rule that a mortgage becomes extinct on payment, and cannot be resuscitated by the parties, meets with an exception where the mortgage is assigned to a third person, who gives value on the faith of a statement that the full amount is due, and that there is no offset: *Kellogg v. Ames*, 41 New York, 259; *Purser v. Anderson*, 4 Edwards, 17. It is well settled that such an acknowledgment precludes the mortgagor from alleging that he has paid the debt; *Scott v. Sadler*, 2 P. F. Smith, 211; and it seems that the conclusion extends to every one who has derived title from him during the interval. It is immaterial that an intervening grant or incumbrance has been placed on record, unless it is brought home to the assignee by actual notice, or the circumstances are such as to render it his duty to inquire; *Mullison's Appeal*, 18 P. F. Smith, 211. A mortgagor who executes a mortgage without consideration, with a view to its being sold as a means of raising money for himself or the mortgagee, cannot set up the want of value as a defence against a *bona fide* assignee for value;

Bloomer v. Henderson, 8 Michigan, 395; *Irwin v. Tabb*, 17 S. & R.; and if he is estopped, so are those claiming under him subsequently as creditors and purchasers. The case is substantially the same where the mortgage is bought on the faith of a declaration that the debt is due. If a mortgage which has been paid but appears unsatisfied of record, is assigned to one who gives value on the faith of a certificate by the mortgagor that he has no defence, and the mortgaged premises are subsequently sold to a third person, the law and equity are both with the assignee; and it would seem that such an assignee is to be preferred to a creditor who obtains judgment after the execution of the mortgage, but before that of the certificate. Such at least seems to be the rule in Pennsylvania, and it is the only one under which the purchaser of a mortgage can be secure. The rule is commonly referred to the doctrine of estoppel, but if this were all, a judgment creditor, who did not participate in or authorize the representation, would not be precluded from contradicting it, or averring the truth; *Schaffer v. Reilly*, 50 New York. The true ground seems to be, that while a mortgage is but a security, and cannot be used for any other purpose, it is still, as it regards that purpose, a conveyance of the legal title. An assignment for value consequently entitles the purchaser to protection against equities of which he is ignorant; *Mullison's Estate*; *Stevenson's Appeal*, 18 P. F. Smith, 212; *post*, vol. 2,

notes to *Bosset v. Nosworthy*. Hence, when the mortgagor's equity, which appears on the face of the instrument, is precluded by a certificate that there is no defence, it is not incumbent on the assignee to look beyond, unless there is something peculiar in the circumstances to excite suspicion and put him on his guard.

In *Matthews v. Walwyn*, 4 Vesey, 123, Lord Loughborough remarked, that to require the assignee of a mortgage to settle the accounts of the person from whom he takes the assignment, would seriously embarrass the transfer of mortgages. He had inquired as to the practice among conveyancers, and the result was, that the persons who were most conversant with such transactions, held it extremely unfit and very rash to take an assignment of a mortgage without making the mortgagor a party, and ascertaining from him that the money was really due.

A different view prevails in New York, under which a mortgage does not pass the title, and is simply the appropriation of a fund to secure a debt. It follows, that an incumbrancer who has obtained priority through the payment of a mortgage of an earlier date, will not be postponed by a subsequent arrangement, which he does not share. In *Purser v. Anderson*, 4 Edwards' Ch. 171, the assignor of a mortgage which had been discharged by payment, covenanted (with the assent of the mortgagor), that the obligation was still in force; and it was held, that though

this might be conclusive as between the parties, it did not estop a second mortgagee from showing the truth. It is established in conformity with this decision, that an assignee of a mortgage takes it subject not only to any latent equities that exist in favor of the mortgagor, but also, subject to like equities in favor of third persons. A mortgage executed and recorded without consideration, as a means of raising money for the mortgagor, is a dead letter in the hands of the mortgagee, and although it may acquire the life and validity through an assignment for a valuable consideration, such a transfer will not operate retroactively to the prejudice of the intervening rights or equities. Nor can such rights be affected or destroyed by any act or representation of the mortgagor; *Schaeffer v. Reilly*, 50 New York, 61. See *Trim v. Marsh*, 54 Id. 599; *Freeman v. Auld*, 44 Id. 59.

In *Schaeffer v. Reilly*, the respondent, Mrs. Burchard, claimed under and by virtue of a mortgage made by one John Reilly to Peter Reilly, in March, 1870, and recorded April 22d, and which had been assigned to her by the mortgagee in the following August. Before taking the assignment, she required and obtained an affidavit from the mortgagor, that Peter Reilly had advanced the principal sum without abatement; that the whole of said sum remained unpaid; and that there was no offset, defence, or counter-claim to the whole or any part of the debt. On the other hand, the

claim of the appellant was founded on a mechanics' lien, which had been filed against the mortgagor on the 7th day of June. It was also in evidence, that the mortgage was wholly without consideration, and had never been actually delivered to the mortgagee, but these circumstances were unknown to the assignee, who relied on the record and certificate. The court held that the mortgagor was precluded from questioning the title of the assignee, who had given value on the faith of his certificate. As against him, her rights were perfect and indisputable; but the respondent's lien stood on its own footing, and could not be affected or destroyed by any subsequent act or representations of the mortgagor. It was well established, that no one could be estopped by the unauthorized declaration of a third person; *Berdan v. Sedgwick*, 44 New York, 626. The mortgage was a nullity as between the original parties, and only acquired force from the transfer to Mrs. Burchard, which agreeably to well known principles could not relate back to the exclusion of an intervening lien.

This case is in entire accordance with the decisions which establish that priority depends on the time when the loan is made or the liability incurred, and not on the date of the instrument. If a mortgagee must search the record before making an advance which he might withhold, so should an assignee who gives value on the faith of a certificate from the mortgagor. The objection is one of policy, that

if third persons, who are necessarily ignorant of the state of the accounts between the parties, could not rely on a certificate that there is no defence or offset, the purchase of a mortgage would be attended with a risk which no prudent man would willingly encounter; *Matthews v. Walwyn*, 4 Ves. 128. Such a result would be equally injurious to the creditor and debtor, by compelling the former to enforce an obligation which could not be transferred without loss.

Another point arose in this case, and merits attention. The court said, that to constitute an estoppel, the assignee must have credited the statement of the mortgagor as true in fact. It was not enough that he relied on it for protection as matter of law. If he knew the truth, it might be shown as a defence to the mortgage. This may have been just, as applied to the case in hand, but it cannot be accepted as a universal proposition. An estoppel does not arise in general, unless one party is guilty of a deceit which misleads the other; *Shipley v. Abbott*, 42 New York, 443. But it is well settled, that one who actively encourages another to buy, is virtually a vendor, and cannot make the purchaser's knowledge that the title is defective, a pretext for impeaching a transaction which he has impliedly agreed to uphold; 2 Smith's Lead. Cases, 715, 722, 741, 7 Am. ed.; *Elliott v. Callan*, 1 Penna. 54; *M'Mullen v. Warner*, 16 S. & R.

It may be inferred from the language held in *Merrill v. Chase*, 3

Allen, 339, *ante*, 870, that the purchase of a mortgage, on the faith of a certificate of no offset, does not give rise to an estoppel in Massachusetts. The instrument had been assigned, with the concurrence of the mortgagor, but the court said that the estate had vested in him through the fulfilment of the condition, and could not be recalled by parol. The question whether such a defence was open under the circumstances, does not seem to have been mooted.

In *Mullison's Estate*, 18 P. F. Smith, 312, a mortgage was executed, without consideration, by Mullison to Butterworth, who promised to dispose of it, and pay the proceeds to Mullison. It was subsequently assigned for value to Kaas, who gave value for it on the faith of a certificate by the mortgagor that the whole amount was due, and that there was no defences or offset, but the negotiation for the sale was conducted by Mullison, and the price was paid to him. Sharswood, J., said that Butterworth's promise was gratuitous, and did not constitute a consideration for the mortgage, or render it valid as against subsequent liens, Kaas could not be regarded as a *bona fide* purchaser. He dealt with the mortgagor, which was sufficient to put him on his inquiry as to the nature of the transaction. It was well settled, that taking a note from the maker, was notice that it had been endorsed for his accommodation, and outside of the usual course of business. The record should consequently have been examined for

intervening incumbrances before accepting the assignment. A different case would have been presented if the purchase had been made from the mortgagee without notice of the want of consideration, and on the faith of a declaration that the bond was due, and would be paid in full.

Whatever the rule may be under these circumstances, it is clear that a certificate procured by fraud will not preclude the mortgagor from alleging the truth, even as it regards a third person, who has given value in the belief that the debt is due; *Otis v. Wilcox*, 44 New York, 403. The court said, that the mortgage and certificate were not negotiable, and might be impeached even in the hands of a *bona fide* purchaser.

A mortgagor who unites in the deed by which a mortgage is transferred, or gives a certificate under his seal that he has no defence, is estopped from denying the validity of the security thus solemnly affirmed, whether the assignee is a purchaser or a volunteer. A parol declaration to the same effect, will operate as an equitable estoppel in favor of an assignee for value, but not of one who takes the mortgage as a security for an antecedent debt; *Ashton's Appeal*, 23 P. F. Smith, 153, 162; 2 Smith's Leading Cases, 720, 7 Am. ed; *Weaver v. Lynch*, 1 Casey, 449. In *Ashton's Appeal*, a mortgage which had been transferred for a

valuable consideration to an assignee, with a sealed certificate from the mortgagor that there was no offset, was again transferred as security for a pre-existing obligation, on the faith of the same certificate, and it was held that the mortgagor was not thereby precluded from making a defence, growing out of a sale of stock by the first assignee, and which would have been valid against him, although the case might have been different if the second assignee had given value for the mortgage. Sharswood, J., said, "we agree with the Court below, that the benefit of the certificate is not confined to the immediate assignee, to whom or for whose security it was made; but that any subsequent assignee claiming under him may avail himself of it. To hold otherwise, would have the effect of closing the market for the sale of his security to the first assignee, if the debtor should refuse to give a new declaration. Upon the same principle, a purchaser, with notice of fraud or trust, may take shelter under the wing of a prior purchaser without notice, otherwise, such prior purchaser would be deprived of the principal value of his privilege. But to avail himself of such an estoppel upon the debtor, the assignee, who sets it up, must show that either he, or some prior assignee from whom he claims, was an assignee for value, and without notice.

*DUKE OF ANCASTER v. MAYER. [*630]

JUNE 26, 1788. JUNE 16, 1784—85. JULY, 1785.

REPORTED 1 BRO. C. C. 454.

PRIMARY LIABILITY OF PERSONAL ESTATE TO THE PAYMENT OF DEBTS. — EXONERATION.] — *Personal estate, not specifically bequeathed, is primarily liable to the payment of the debts of a testator, unless it be exempted by express words or necessary implication. Notwithstanding a charge upon a term for payment of debts, a leasehold estate purchased by the testator subject to a mortgage shall bear the burthen of that mortgage, it not being properly the debt of the testator.*

CHARLES BERTIE made his will, dated the 9th of November, 1759, and thereby devised as follows: "I give and devise to Thomas Noel and John Mayer, their executors, administrators, and assigns, all those my manors, lands, &c., in Lincolnshire, to have and to hold to them, from the time of my decease, *for the term of ninety-nine years*, upon the trusts hereinafter mentioned." He then gave the real estate, subject to the term, and in default of issue of his own body, to Montague Bertie, for life, remainder to his first and other sons in tail male, remainder to the plaintiff for life, remainder to his first and other sons in tail male, with remainders over, and afterwards declared as follows: "I do hereby declare, that the *term and estate so as aforesaid limited to them the said Thomas Noel and John Mayer, their executors, administrators, and assigns, for ninety-nine years*, is upon the special trust and confidence, and to the intents and purposes following; that is to say, Upon trust and confidence that they the said Thomas Noel and John Mayer, *their executors, &c., shall [*631] *out of the rents and profits, or by mortgage, assignment, or demise of all or any part of my before-mentioned manors, &c., or any of them, for all or any part of the said term of ninety-nine years, or otherwise as to their discretion shall seem meet, levy and raise so much lawful money of Great Britain as will be sufficient to pay and satisfy all the debts I shall owe at the time of my decease, my funeral charges, and all the legacies and sums of money given by me in and by this my will, and pay and apply the same accordingly. And my will and mind is, that, after so much money shall be raised as shall answer the purposes aforesaid, together with all costs and charges in or about levying or raising thereof, the said term shall cease and determine.*" He then devised as follows: "*I give and devise to my brother, Montague Bertie, his executors and administrators, all that the manor of East and West Deeping, holden by lease from the Crown, subject to the yearly rents and covenants reserved in the said lease, and also subject to the mortgage thereon to Mrs. Millicent Neate, of Lon-*

don, for 6500l.; but in case my said brother shall not be living at the time of my decease, then I give the said estate and premises, with the appurtenances, subject as aforesaid, to such person as shall be entitled to the freehold of my real estate at the time of my decease, by virtue of the aforesaid limitations in of this my will." And towards the end of his will be devised as follows: "Item, I also give all my household goods, and all other my goods, chattels, effects, and personal estate whatsoever and wheresoever, unto my said brother, Montague Bertie, if he shall be living at the time of my death; but in case he shall be then dead, I give and devise the same to such person as shall be entitled to the freehold of my real estate, under and by virtue of the limitations in this my will: provided always, and I do hereby declare my mind and will to be, that in case I shall at the time of my death leave issue of my own body, that then and in such case as well all and every the before-mentioned uses, devises and limitations to my said brother, [*632] Montague Bertie, the Duke of *Ancaster, and their respective heirs, and also the devise of the residue of my personal estate, shall be utterly void; and in such case I do hereby will, and my mind is, that all my real estate, subject to the said term of ninety-nine years, shall descend according to the rules of law, and that the residue of my personal estate shall go and be distributed in such manner, and to and among such persons, as if I had died intestate. And I do hereby nominate and appoint the said Thomas Noel and John Mayer executors of this my last will; and I do hereby will, order, direct, and appoint, that my said executors and the survivor of them shall and do pay, satisfy, and discharge my funeral charges, *and all my debts and legacies*, as soon as they shall become due and payable, by such methods, ways, and means, and in such manner as he or they, or their counsel learned in the law, shall in that behalf advise and think meet; and it shall and may be lawful to my said executors, or either of them, to deduct and satisfy to him or themselves, out of my personal estate, or out of the moneys to be raised out of the said term of ninety-nine years before to them devised, all such disbursements, expenses, and charges which they or either of them shall be put to in proving this my will, or by any other ways or means whatsoever in or about the execution of this my will."

Montague Bertie died in the lifetime of the testator, and the plaintiff became entitled, under the limitations in the will, to the real estate.

The leasehold estate had been several years before mortgaged by the testator's father for 6000l. to Mrs. Neate, and in 1765 the mortgage was assigned, by the desire of the testator, to Sir Thomas Palmer, who advanced the testator a further sum of 100l. on it, and the testator conveyed other estates as an additional security for the 6600l.

This cause was first heard before the late Lords Commissioners.

Mr. *Mansfield*, Mr. *Madocks*, and Mr. *Kenyon*, for the *plaintiffs.—There are three questions in this case; first, [*633] whether the personal estate is exonerated of the debts; secondly, whether the mortgaged estate is liable to the mortgage; thirdly, what interest the duke takes in the personal estate.

As to the first, although the personal estate be the original fund for the repayment of debts, yet the testator may discharge it against the devisee of his real estate; and if his intent so to discharge it appear upon the face of the will, that intention shall govern. Here he has created a term for the payment of his debts, which sufficiently points out his intention. The cases show, that an intention so demonstrated is sufficient. *Bamfield v. Wyndham*, Prec. Ch. 101: the testator providing a real fund for the payment of his debts, and giving his personalty to his wife, it was held, she should take it exonerated from the debts. *Wainwright v. Bendlowes*, 2 Vern. 718: devise for payment of debts, and the personalty held exempt. In *Walker v. Jackson*, 2 Atk. 624, the personal estate was held to be a specific legacy, and of course exonerated. *Anderton v. Cooke*, 4th June, 1775: Thomas Calendar gave several specific parts of his personal estate; he then gave part of his real estate in strict settlement, and devised the remainder of his real estate to trustees, in trust to sell for the payment of debts; and in case that should not be sufficient to discharge the debts, he charged the deficiency on the devised real estates. He then gave the residue of his personal estate, not before bequeathed, to his wife. The Court held, she took it wholly exempt from the debts. In *Stapleton v. Colville*, Ca. t. Talb. 202; in *Holliday v. Bowman*, before Lord Bathurst, 1 Bro. C. C. 145, cited; *Kynaston v. Kynaston*,¹ and *Glede v. Glede*, the same doctrine has been held.

Secondly, the second point is, whether the mortgage shall also be discharged by the real estate. This point is determined by the case of *Serle v. St. Eloy*, 2 P. Wms. 386, which is recognised in *Galton v. Hancock*, 2 Atk. 437.

Thirdly, the last question is, what interest the duke *shall take. He claims under the description of the per- [*634] son who should come into possession, and must take the same interest that Montague Bertie would have taken; that is, the absolute interest.

Mr. *Selwyn*, Mr. *Arden*, and Mr. *Ainge*, for the defendants.—As to the last question, we contend the duke can take a limited interest for life only, there being no addition of executors or administrators in the will. Secondly, with respect to the second, that the mortgaged premises must bear their own burthen.

¹ The testator by his will charged his whole estates with payment of all his debts, legacies, and funeral expenses; and for that purpose he devised particular lands to trustees in trust to sell the same, and pay his debts, legacies, and funeral expenses; and he gave to his wife all his personal estate whatsoever, and constituted her sole executrix. The debts exceeded the personal estate. Lord Bathurst determined the personal estate to be exempt.

As to the other, which is the principal question, it depends on the several clauses in the will. The first clause creates the term; the next, which is material, is that by which he gives the personal estate; the third, that appointing the executors, and directing them to pay the debts by such means as they should think meet. In this case there is no specific bequest of the personal estate. If he had meant the executors should pay the debts out of the term, he would not have left it in their option how they should pay them. In order to exonerate personal estates from the payment of debts, there must be an express direction that they shall be paid out of some other fund, or something tantamount to such express direction; but here is no necessary implication that the fund should be exempt. In *Banfield v. Wyndham*, the debts were more than the amount of the personal estate. In *Wainwright v. Bendelowe*s the estate was ordered to be sold out and out. In *Bromhall v. Wilbraham* (at the Rolls, November, 1784), the testator gave all his personal estate to his sister, whom he made executrix; he gave his real estate to his brother, charged with his debts; but the personal estate was held to be first liable. In the case of *Lord Inchiquin v. O'Brien*,¹ (8th February, 1744), before Lord Hardwicke, the Earl of Thomond by his will directed that all his debts should be paid. He devised his real estate to Lord Inchiquin and another, in trust that they should make sale of a sufficient part of the estate, and out of the money arising therefrom, together with the rents and profits, should, in the first [*635] place, pay all the *debts which he should owe at the time of his death, and his legacies; and subject thereto he limited his real estate over. He gave Sir William Wyndham 20,000*l.*, and some other legacies: then followed these words: "and his further will was, that the whole money to be raised by such sale should be taken as part of his personal estate;" lastly, he gave the rest and residue of his personal estate whatsoever, after payment of his debts, to the defendant; the personal estate was first applied. In *Fereges v. Robinson*, Bunb. 301, the same doctrine was laid down, because, as the Court observed, there were no negative words to exonerate the personal estate. In *Stephenson v. Heathcote*,² Harper devised lands to trustees, in trust, by sale or mortgage, to raise so much money as would pay all his debts and funeral expenses; he then gave a silver tobacco-box to A. B., and gave all the residue of his personal estate to his wife, and made her executrix: Lord Northington ordered the personal estate to be first applied.

Lord Commissioner ASHURST delivered the opinion of himself and Lord Commissioner HOTHAM.—The first question is, whether, under the will of Charles Bertie, the plaintiff is entitled to the personal estate, discharged of the debts. Secondly, whether the personal estate is the fund out of which the mortgages are to be

¹ *Lord Inchiquin v. French*, Amb. 33; 1 Cox, 1; 1 Wils. 83.

² 1 Eden, 38.

paid. Thirdly, what estate the plaintiff takes in the freehold and personal estate.

The main question is, whether the plaintiff is entitled to the personal estate, discharged of the debts. The cases are determined on different grounds. *Adams v. Meyrick*, 1 Eq. Ca. Ab. 271, which is in favour of the plaintiff, made the ground that the testator said that the trustees do and shall, by mortgage, &c., pay: this is a very loose ground, and has been since abandoned. *Frege's v. Robinson*, in Bunb. 301, is the most sensible case. In *Walker v. Jackson*, 2 Atk. 624, Lord Hardwicke says, the general rule is, that the personal estate shall be first applied, but that against his devisee the testator may *charge his real estate instead of his personal. The personal estate must be first applied, unless there are express words or a plain intent to the contrary. The only question in every case of this kind is, whether you can satisfactorily find out whether the testator meant to exempt the personal estate from the debts, for there are no technical words by which it is to be done. In this case, if it depended on the two clauses in the will, the intent could not be doubted—the trustees are to raise sufficient to pay all the debts. The next thing to be considered is, whether there is anything in the latter part of the will to overturn this apparent intent. It seems highly probable the word “residue” was thrown in without any meaning, or to give an option to the trustees out of which fund to take their expenses, and that they might not be in advance. At all events, it excludes the idea that the charge was to fall upon the personalty. The more modern authorities have gone in exclusion of the personalty, upon much less reason: *Anderton v. Cooke*; *Hulday v. Bowman*, 1 Bro. C. C. 145, cited. We think the Duke of Ancaster is entitled to the personal estate, exempt from payment of debts.

The next question is, whether it should be charged with the mortgages. And as to this point, we are bound by the cases of *Serle v. St. Eloy*, 2 P. Wms 386, and *Galtm v. Hancock*, 2 Atk. 424, to decree that the mortgage must be paid out of the devised estate.

The third question is, what interest the duke takes in the personalty. He took an absolute one: there is no need of express words for this purpose; it is beyond a doubt Montague Bertie would have taken absolutely; then, where the testator gives it by the description of the person entitled to the freehold, he does not state the interest so given to be a less interest than that of Montague Bertie.

A petition was presented for a rehearing, which came on before Lord Thurlow, the 16th of June, 1784. The arguments used, and the cases cited, were a recapitulation of those before the Lords Commissioners.

*LORD CHANCELLOR THURLOW.—It would be highly advantageous to property if there was a settled rule where the [*637]

personalty shall be applied to the payment of debts, and where it shall be exempted from them. One step has been taken towards such a rule, by its being laid down, that charging the estate in any way is not of itself an exemption of the personal estate; that the personal estate being the fund first liable, where it is to be aided by either a legal or an equitable fund, it must be itself in the first place applied.

The question that next arises is, whether, a real estate being charged, and the personal given away, a presumption arises that this shall be exempted from the debts. I never heard, till the arguments in this case, that such a rule had been extracted from the authorities on the subject; on the contrary, I have always understood that, in order to exempt the personal estate, the testator must express an intention so to do, although no particular form of words was necessary for the purpose. I therefore take the rule in primis to be, that neither the charge of the debts upon the real estate, nor the gift of the personal estate, is sufficient of itself to exempt it. But it is indubitably true, that express words are not necessary to exempt the personal estate: the question therefore is, whether a presumption can be drawn of the testator's intention to exonerate the personal estate. It is impossible to express in definition what circumstances shall be sufficient to raise this presumption. It must arise from the context of the will; but, with great deference to the opinion which has been given, I think there is not sufficient in this will.

After devising his real estate, the testator takes up the term; he places it before any of his other estates, and before his issue, so that he meant it to be a subsisting term for the payment of his debts. He gives his leasehold estate to Montague Bertie, but without any predilection; for he gives it to whoever should be entitled to the possession of his freehold estate. He then proceeds to declare the trusts of the term which are to raise money [*638] *to pay his debts and legacies; and after raising them, the term is to cease. He then disposes of the rest of his personal estate. He afterwards determines what shall be done with the personal estate in case he should have issue. In the provision which he superadds, he takes notice of the devise of the personalty, and calls it a residue; by which he means the devise of the personal estate after the specific bequest. He provides then, that if he should die leaving issue, the dispositions he had made should fail: this was not essentially necessary, though apparently so. He then makes a general provision for the discharge of the executors, who are also trustees; so that it is given them in the character of executors. It is also material to observe, that, in the special and general disposition of the personal estate to the same person who shall be entitled to the possession of the real, the personal is made to accrue to the real, which is settled with the utmost strictness. The question, then, is whether any inference is to be drawn that he meant it should go with the burthen the law throws upon it, or whether it is to be presumed that it should be exonerated, for

the purpose of throwing that burthen on the freehold estate, which he has given in the strictest manner. The inference rather seems to me to be, that he meant to protect the real estate, and therefore that the personal should bear its natural burthen. By chance he has gone further: for, where he has given directions for the indemnity of his executors, he has directed the expenses to be taken out of either the personal or real estate. He has, in that clause, arranged the estates as the law would arrange them; which affords an inference that he meant the real estate only to be in aid of the personal. I should therefore think, if the rule were, that the gift of the personal estate to a stranger was sufficient to raise a presumption that it was to be exempt from the debts, he had sufficiently here expressed his intention that it should not be so; but I take the general rule to be the other way.

I should have no doubt on the intention of the testator *in this respect, if there were not another point, which I think ought to undergo further inquiry—I mean the [*639] mortgage of the leasehold estate. The case of *Serle v. St. Eloy*,¹ went upon the idea of the charge upon the real estate being the debt of the testator. If that case were recent, and had not been followed, I should have thought, upon the face of it, it was very open to argument. The difference between the cases is, that if it had been real estate mortgaged by the father, it would have been liable only as a charge; but, in the present case, the debt of the father falls upon the estate in two ways—partly as being a charge, and partly as a debt, upon the personal estate. It must be referred to the Master to consider the circumstances of the debt of 6000*l.*, and the estate on which it was secured; and, as that point must stand over, I shall think it no impediment to the justice of the Court to defer the decree upon the other point also.

The Master having made his report that the 6000*l.*, was a charge upon the leasehold estate prior to the testator's having any interest in it, and that he had only covenanted for the payment of the money upon the transfer of the mortgage from Mrs. Neate to Sir Thomas Palmer,² the cause was again set down for argument on the 4th July, 1785, and then stood for judgment till the next day, when the Lord Chancellor pronounced his decree.

LORD CHANCELLOR THURLOW.—Whether the personal estate should be liable, in the first instance, in exoneration of the real estate, to the payment of debts in wills of this kind, upon looking into the cases I find to be a point so slender and fine that I cannot collect any certainty upon the question; but so much uncertainty abounds, that, could the will of the testator be referred to a number of lawyers, they would probably entertain a diversity of opinions upon it.

¹ 2 P Wms. 386.

² A further sum of 100*l.* was, it seems, advanced to the testator. Vide ante, p. 632.

personalty shall be applied to the payment of debts, and where it shall be exempted from them. One step has been taken towards such a rule, by its being laid down, that charging the estate in any way is not of itself an exemption of the personal estate; that the personal estate being the fund first liable, where it is to be aided by either a legal or an equitable fund, it must be itself in the first place applied.

The question that next arises is, whether, a real estate being charged, and the personal given away, a presumption arises that this shall be exempted from the debts. I never heard, till the arguments in this case, that such a rule had been extracted from the authorities on the subject: on the contrary, I have always understood that, in order to exempt the personal estate, the testator must express an intention so to do, although no particular form of words was necessary for the purpose. I therefore take the rule in primis to be, that neither the charge of the debts upon the real estate, nor the gift of the personal estate, is sufficient of itself to exempt it. But it is indubitably true, that express words are not necessary to exempt the personal estate: the question therefore is, whether a presumption can be drawn of the testator's intention to exonerate the personal estate. It is impossible to express in definition what circumstances shall be sufficient to raise this presumption. It must arise from the context of the will; but, with great deference to the opinion which has been given, I think there is not sufficient in this will.

After devising his real estate, the testator takes up the term; he places it before any of his other estates, and before his issue, so that he meant it to be a subsisting term for the payment of his debts. He gives his leasehold estate to Montague Bertie, but without any predilection; for he gives it to whoever should be entitled to the possession of his freehold estate. He then proceeds to declare the trusts of the term which are to raise money [*638] *to pay his debts and legacies; and after raising them, the term is to cease. He then disposes of the rest of his personal estate. He afterwards determines what shall be done with the personal estate in case he should have issue. In the provision which he superadds, he takes notice of the devise of the personalty, and calls it a residue; by which he means the devise of the personal estate after the specific bequest. He provides then, that if he should die leaving issue, the dispositions he had made should fail: this was not essentially necessary, though apparently so. He then makes a general provision for the discharge of the executors, who are also trustees; so that it is given them in the character of executors. It is also material to observe, that, in the special and general disposition of the personal estate to the same person who shall be entitled to the possession of the real, the personal is made to accrue to the real, which is settled with the utmost strictness. The question, then, is whether any inference is to be drawn that he meant it should go with the burthen the law throws upon it, or whether it is to be presumed that it should be exonerated, for

the purpose of throwing that burthen on the freehold estate, which he has given in the strictest manner. The inference rather seems to me to be, that he meant to protect the real estate, and therefore that the personal should bear its natural burthen. By chance he has gone further: for, where he has given directions for the indemnity of his executors, he has directed the expenses to be taken out of either the personal or real estate. He has, in that clause, arranged the estates as the law would arrange them; which affords an inference that he meant the real estate only to be in aid of the personal. I should therefore think, if the rule were, that the gift of the personal estate to a stranger was sufficient to raise a presumption that it was to be exempt from the debts, he had sufficiently here expressed his intention that it should not be so; but I take the general rule to be the other way.

I should have no doubt on the intention of the testator *in this respect, if there were not another point, which I think ought to undergo further inquiry—I mean the [*639] mortgage of the leasehold estate. The case of *Serle v. St. Eloy*,¹ went upon the idea of the charge upon the real estate being the debt of the testator. If that case were recent, and had not been followed, I should have thought, upon the face of it, it was very open to argument. The difference between the cases is, that if it had been real estate mortgaged by the father, it would have been liable only as a charge; but, in the present case, the debt of the father falls upon the estate in two ways—partly as being a charge, and partly as a debt, upon the personal estate. It must be referred to the Master to consider the circumstances of the debt of 6000*l.*, and the estate on which it was secured; and, as that point must stand over, I shall think it no impediment to the justice of the Court to defer the decree upon the other point also.

The Master having made his report that the 6000*l.*, was a charge upon the leasehold estate prior to the testator's having any interest in it, and that he had only covenanted for the payment of the money upon the transfer of the mortgage from Mrs. Neate to Sir Thomas Palmer,² the cause was again set down for argument on the 4th July, 1785, and then stood for judgment till the next day, when the Lord Chancellor pronounced his decree.

LORD CHANCELLOR THURLOW.—Whether the personal estate should be liable, in the first instance, in exoneration of the real estate, to the payment of debts in wills of this kind, upon looking into the cases I find to be a point so slender and fine that I cannot collect any certainty upon the question; but so much uncertainty abounds, that, could the will of the testator be referred to a number of lawyers, they would probably entertain a diversity of opinions upon it.

¹ 2 P Wms. 386.

² A further sum of 100*l.* was, it seems, advanced to the testator. Vide ante, p. 632.

The point ought to be fixed ; and, in order to make it so, I take it, the rules have been these, and should be adhered to. In the first place, that *the personal estate is *liable in the first in-* [640] *stance to the payment of the debts*; but (in exception to this) it is agreed that the testator may, if he pleases, give his personal estate, as against his heir or any other representative, clear of the payment of his debts ; and then it becomes a question, what is the mode of expression to give the personal estate exempt from such payment, when the rule of law is, that such estate is first liable. Perhaps it might have been not unwise to have adopted the rule laid down in *Fereges v. Robinson*,¹—that the testator must use express words for that purpose: but it is impossible to abide by the opinion given in that case, consistently with the rules in other cases. The second rule is, that *where there is a declaration plain, that shall stand in lieu of express words*. This rule has been laid down so long, and acted upon so constantly, that if other judges were to put the construction of wills upon other grounds, how wise soever it might have been originally to have done so, it would be very unwise to make the administration of justice take a course contrary to former rules. Therefore, if there be a declaration plain, or manifestation clear, so that it is apparent, upon the face of the will, that there is such a plain intention, the rule then is, not to disappoint, but to carry such intent into execution. But should not such intention manifestly appear, there is not a single case which does not take it for granted that the personal estate is, by law, the first fund for the payment of debts.

In regard, then, to the general intention of the will of Charles Bertie, the testator was seised of a real estate, which he had in his contemplation (exclusive of the idea of his own children), and wished to leave it to other lines of the family of Bertie ; and consequently devised it to Montague Bertie, with remainder over to Peregrine Bertie for life, &c.: so far, in respect of the real estate, his intention was to fix it in the name and blood of the family.

The next object he had in view was a leasehold estate, which he held under the Crown ; that estate was a chattel interest, and with regard to that, he does not show such *a wish to fix [641] and continue that estate in the line of Bertie: his apparent wish was not so strong as in respect to the disposal of his real estate ; for had it been so, though he could not have created an entail of this leasehold estate with limitations over, yet he might have prevented the first taker of it from alienating it. Had the testator been asked the question, whether he meant that this part of his estate should be subject to the mortgage, or to give it entire to the first taker of the real estate, or to charge the term of ninety-nine years in exoneration of the other estate, this might have been a very doubtful question, and merely conjectural, though, perhaps, he might have answered, that the estate should pay the

¹ Bunb. 301.

debts; but whatever his intention was, he has positively given it subject to the payment of the debt: therefore, if another estate had been appropriated to payment of his debts, and this had been *his* debt upon the estate. I should have concurred with the Lords Commissioners:¹ but in following them in that course, in which they considered it as being the clear intention in the mind of the testator, that the real estate should be so appropriated, I rather think otherwise; for it appears to me as if the testator wished it should not, and that he chose that the leasehold estate should be so appropriated rather than to have burthened the real estate. For the mode of limiting the estate to Montague Bertie for life implies the intention of giving him a personal bounty; but, in case of failure of issue, he gives it to the next heir who should come into possession, &c. Had the real estate been expressly charged with payment of the debts, or the testator shown an anxious intention to have sacrificed his real estate in preference to the leasehold or his other estate, for that purpose, by the mode of disposing of his estates, such a circumstance might have been sufficient to have turned the rule of law; and it must have been appropriated to the payment of debts, let him have charged it in any manner he pleased.

When the testator purchased this leasehold estate he purchased the equity of redemption; and the mortgage ^{was to be} considered merely as a real incumbrance on the estate [*642] itself, and not a personal debt, as against the purchaser, according to the rules of this Court and cases decided. For *if a man purchases an equity of redemption, subject to incumbrances that shall be real incumbrance following the land, and not a personal one*, the question is, whether, by purchasing this estate, and assigning the mortgage from Mrs. Neate to Hoare, and covenanting for payment of debts, he did not make it his own debt. Had *Evelyn v. Evelyn*, 2 P. Wms. 659, never been decided, a fair argument might have arisen upon that head; because, where a man transfers a mortgage, and covenants for the payment of the debt according to the rule of law, he makes it his own debt, and makes himself liable to be sued upon that covenant; and such a debt has priority before other simple contract debts. Now, I do not know in what Court, or by what rule, the debt would have followed the purchaser personally: but *Evelyn v. Evelyn* has decided, that though he might be at law liable, yet where there are real assets sufficient for the payment of the incumbrance, they shall be applied for that purpose; and it is to be understood with respect to such transaction, that the party did it by way of accommodating the charge, and not of making the debt his own. The difference between the estate descended and purchased is nothing, unless the circumstance of purchasing creates the difference; but that affords no argument.

¹ Sed vide *Bootle v. Blundell*, 1 Mer. 227; *Bickham v. Cruttwell*, 1 My. & Cr. 763.

The next question is, whether, when he mortgages an estate of his own as an ulterior security, that circumstance would create a difference; as if, in *Evelyn v. Evelyn*,¹ an additional real fund had been secured for making the debt good, that would have turned the judgment: it would not; for nothing makes it his debt so effectually as the covenant to pay; for it does not create the debt, but only operates as collateral to the debt. A man mortgages his estate without covenant, yet, because the money was borrowed, the mortgagee becomes a simple contract creditor, and in that case the mortgage is a collateral security; and if there [¶643] is a bond or a covenant, *then there is a collateral security of a higher species, but no higher by means of the mortgage merely: therefore, having such security amounts to nothing; and I have no doubt but that if the case had been stated to the Lords Commissioners, namely, that this incumbrance was not one of the testator's debts, and did not fall upon the personal estate, that they would have considered it as inherent to the leasehold estate. The argument of its not falling upon the testator answers his real intention better. But as to the real intention, I should have agreed with the Lords Commissioners, could that intention have been made clear; but the intention does not amount to a declaration plain, in any sense in which these words have been properly applied.

For the purpose of securing property and the due administration of justice in a free country, judges ought to abide constantly by real principles, and by such beneficial rules as may afford some reasonable judgment, without applying to a superior tribunal. It is a fixed rule, that the personal estate must be first liable, unless another fund is provided; the testator must express his intention to discharge that estate from the payment of debts.

With regard to the intention apparent upon this will, it is said such intention is most anxiously limited to the raising of the term of ninety-nine years. Whether the expression be more or less, it is but subjecting the estate to the payment of debts; and it cannot extend so far as to suppose he burthened his real estate in exoneration of the personal estate. If there had been in the gift of the personal estate words of a sufficient force, according to my notion of a declaration plain, I should not have changed the force of those words; but the intent of these words, as they stand, naturally leans to subject the personal estate to the debts. With respect to the second clause, had that stood alone, I confess that would have been liable to a degree of inference; but constructions thus picked up, and collected from more circumstances than [¶644] are necessary for the purpose, are not good ways of *finding out the intention of the testator; and it is better to rest upon settled rules, unless you can collect more favourable and forcible observations. With regard to the next clause, that carries more weight, because the trustees are directed to pay, not

¹ 2 P. Wms. 659.

only the expense of the probate of the will, which is expressly mentioned, but to pay all the charges and expenses that should arise by proving the will, or by any other means, &c. How are these to be paid? Out of the personal estate, or the means to be raised out of the term of ninety-nine years? They have authority to pay the whole out of the personal estate—an optional clause, and empowering the executors to pay out of this fund before the other fund is ready for the purpose. He has precisely arranged the estates in the same order that the law would have done; he has made his personal estate first liable, and then the term. The true ground upon which I proceed is not upon any of these criticisms, but simply upon the rule of law, the testator not having declared by express words, or any other declaration, which would tend in law to the purpose of preserving the personal estate for any given purpose whatsoever. As to *Adams v. Meyrick*,¹ that depended on the circumstance of the personal estate being a provision for the wife; and, therefore, the Court forced a construction upon the will, and it is, as Lord Hardwicke termed it, in *Walker v. Jackson*, 2 Atk. 624, a weak case: in the latter case, the republication of the will was an argument much relied upon. As to the cases determined upon the words “rest and residue,” I could have wished his Lordship had decided upon them all, so as to have left a particular note upon each of them; for such determinations as those cases afford have occasioned great perplexity upon the rule of law. As to *Stapleton v. Colville*,² in that case the wife was executrix, and, exclusive of the context of the will, with regard to the option given to her to charge either fund, there never was a stronger case against charging the real estate; for he gives the whole real estate to the wife, and to be charged with debts; he wishes the continuance in his name and family, [*645] and yet charges it with the payment of the debts. Lord Talbot observed, much might arise from the examination as to the quantum of the debts and the amount of the personal estate. Lord Talbot took it as clear, that such an examination should be gone into. In *Stephenson v. Heathcote*,³ it is said expressly, no examination can be had. In that case, Lord Keeper Henley relied much upon the wife being executrix. The case was this: that the testator gave all his real estate to R. and his wife for ever, with a charge thereon for payment of debts; and, after disposing of other property, he gives a silver tobacco-box to his uncle, and all the residue he gives to his wife for ever, whom he appointed sole executrix. The Lord Keeper’s observation upon this case was, that the intent of the testator was to be collected from the words of the will, and from no circumstances out of it; and, upon general principles and rules established in the cases, that the Court could not go into the testator’s circumstances, as it would establish a rule not to be adhered to. The testator intended to charge his personal estate with payment of his debts, and only

¹ Eq. Ca. Ab. 271.² Ca. t. Talb. 202.³ Eden, 38.

made his real estate an auxiliary fund: according to the rule of law, where the intent of the testator is plain, or words tantamount to express words, that is sufficient to take it out of the rule, and that it could not be the intention; for the last clause, of giving the silver tobacco-box, and then the residue to his wife, is not sufficient to show his intention to give the residue free from debts, but that the primary fund should be liable.

In the present case, I am obliged to differ from the Lords Commissioners, and consider the whole personal estate as liable to the payment of the debts; and, with respect to the leasehold estate, that the charge under which it came to the testator was prior to his purchasing it, and inherent in the estate, and the estate itself left liable to answer it, and that neither the personal estate nor real estate ought to be charged with that debt.

The judgment *ex relatione*.

[*646] *The rule laid down by Lord Thurlow, in the principal case, viz., *that the general personal estate of a testator is the primary fund for the payment of his debts, unless it be exempted by express words or manifest intent*, has been fully recognised, although the difficulty of gathering the intent, where the exoneration of the personal estate does not depend upon express words, has induced subsequent judges to join in the doubt intimated by the Lord Chancellor, of the wisdom of the departure from the older decisions, requiring express words to exempt the personal estate from its primary liability. In the case of *Watson v. Brickwood*, 9 Ves. 453, Sir W. Grant observes, "There is no reason whatsoever, either of justice or convenience, to induce me to depart from the rule laid down by Lord Thurlow in *The Duke of Ancaster v. Mayer*, requiring that, in order to exonerate the personal estate, there shall be either express words or a plain indication of that intention. Indeed, I wish the rule had been still more strict, and that nothing but express words had been permitted to alter the course and order of law. . . . However, after the cases that have been decided, it is too late to say, it is not open to the Court to collect from the whole will an intention to exonerate the personal estate, though that intention is not expressed by any positive and exclusive words."

The rule, therefore, as to the primary liability of the personal estate does not apply when it is exempted, first, by express words of a testator: *Morrow v. Bush*, 1 Cox, 185; *Young v. Young*, 26 Beav. 522 (and on this head it will be unnecessary to make any observation): or, secondly, by his manifest intention in lieu of express words.

In considering this subject it should be always borne in mind that the burden of proof lies on those who contend that the personal estate is exonerated: *Whieldon v. Spode*, 15 Beav. 539; *Lord v. Wightwick*, 1 Drew. 576.

It has been frequently decided, that neither a charge upon land, nor a direction to sell, nor the creation of a term for payment of debts (see *Tower v. Lord Rous*, 18 Ves. 132, 138; *White v. White*, 2 Vern. 43; *Bridgeman v. Dove*, 3 Atk. 201; *Lord Inchiquin v. French*, 1 Cox, 1; *Hancox v. Abbey*, 11 Ves. 186; *Rhodes v. Rudge*, 1 Sim. 79; *Collis v. Robins*, 1 De G. & Sm. 131; *Walker v. Hardwick*, 1 My. & K. 396; *Ouseley v. Anstruther*, 10 Beav. 453; *Quennell v. Turner*, 13 Beav. 240); or a devise of real estate, upon the condition of the devisee paying the testator's debts (*Bridgeman v. Dove*, 3 Atk. 201; *Meade v. Hide*, 2 Vern. 120; *Henry v. Henry*, 6 I. R. Eq. 286), will exempt the personalty from its primary liability. "It is not sufficient," says Lord Thurlow, "to charge the real estate, but a *testator must show [*647] that it was his purpose that the personal should not be applied:" *Samwell v. Wake*, 1 Bro. C. C. 145. So Lord Eldon, in *Bootle v. Blundell*, 1 Mer. 220, observes: "I take it to be certain, that it is not enough for the testator to have charged his real estate with, or in any manner devoted it to, the payment of his debts; that the rule of construction is such as aims at finding not that the real estate is charged, but that the personal estate is discharged."

And the parol evidence will not be admitted to show the intention of a testator to give his personal estate free from debts; nor will any inference be drawn of the testator's intention, by a consideration of the relative amount of his personal estate and debts; nor, consequently, will any inquiry be directed in order to ascertain such relative amount: *Stephenson v. Heathcote*, 1 Eden, 38, overruling the cases of *Gainsborough v. Gainsborough*, 2 Vern. 252, and *Lady Glanville v. The Duchess of Beaufort*, 2 Vern. 648. See, also, *Bootle v. Blundell*, 1 Mer. 221, and *Tait v. Lord Northwick*, 4 Ves. 816. In the last case, a testator devised certain estates to trustees, upon trust, by sale or mortgage, or by sale of the timber thereon, to raise such sums of money as should be requisite to pay his debts by mortgage, bond, or by other specialty, or by simple contract, or otherwise howsoever; and, after payment of the said debts, he directed the trustees to convey the estates, or such parts thereof as should not have been disposed of, and the equity of redemption of such parts thereof, as should have been mortgaged to certain uses; and, after giving each of his trustees a legacy of 100*l.*, he gave all the rest, residue, and remainder of his personal estate whatsoever, to his two sisters equally, and he appointed two of the trustees executors. It was argued, from the state of the testator's property, his personal estate being small and inadequate for payment of his debts, that he must have intended that his real estate should be primarily liable, for otherwise his sisters would take nothing. But Lord Loughborough, C., held the personal estate primarily liable. "Charging the real estate," observed his Lordship, "ever so anxiously for payment of debts, will not of itself be sufficient to exempt the per-

personal estate. I set the whole doctrine afloat, if the argument for the two sisters upon this will is allowed to prevail; for it only comes to this — there are two circumstances; one, that there is a gift of residue of the personal estate; another, that there is a very anxious charge of debts upon the real estate. Beyond that I have no ground to stand upon: as the rest of the circumstances are merely conjectural upon a supposed intention; and, it is asked, what could the testator mean by giving these sisters *his personal estate, if they get nothing by it? All I say to that is, that a man giving the residue of his personal estate, does not in general mean much. It is as it may happen."

A mere charge of funeral or testamentary expenses, or of both, in addition to debts upon real estate, will not of itself exempt the personalty: *Brydges v. Phillips*, 6 Ves. 570; *Stephenson v. Heathcote*, 1 Eden. 38; *Aldridge v. Wallscourt*, 1 Ball & B. 312; *Tait v. Lord Northwick*, 4 Ves. 816; *Gray v. Minnethorpe*, 3 Ves. 103; *Hartley v. Hurl*, 5 Ves. 540. Sed vide *Burton v. Knowlton*, 3 Ves. 107, in which case, Lord Alvanley, M. R., considered that the direction to pay debts and funeral expenses out of a fund to arise from the sale of real estates devised to trustees who were not executors upon whom the funeral expenses would naturally fall, afforded a considerable argument that the testator did not mean the personal estate to be the fund for all those charges which naturally fall upon it, and that the residue which was given to a person for his own benefit, who was afterwards appointed executor, was specifically given, and consequently only liable as an auxiliary fund to the realty. See, however, the comments upon this case by Lord Loughborough, C., in *Tait v. Lord Northwick*, 4 Ves. 823, and by Lord Eldon, C., in *Bootle v. Blundell*, 1 Mer. 229.

But where a testator throws upon his real estate all those burthens which naturally fall upon the personal estate as a primary fund, such as funeral and testamentary expenses, debts, and legacies, a strong, though not absolutely conclusive argument arises, that the testator intended to give his personalty as a specific legacy, free from those charges, and that, consequently the realty is the primary fund for their payment: *Tower v. Lord Rous*, 18 Ves. 139. In *Bootle v. Blundell*, 1 Mer. 238, with regard to funeral and testamentary expenses being charged on real estate, Lord Eldon, C., says, "On looking through the precedents, it is impossible to deny that this is a circumstance on which great stress has always been laid, namely, where the real estate is made liable to the payment of such expenses as exclusively regard the administration of the personal estate, such as the costs of probate, and other costs sustained in the execution of the will." See also *Plenty v. West*, 16 Beav. 173.

As to what expenses relating to real estate are properly payable out of a fund set apart to pay, amongst other things, the expenses "of the execution of the trusts of the will," see *Lord Brougham v. Lord Wil-*

liam Poulett, 19 Beav. 119; *Webb v. De Beauvoisin*, 31 Beav. 573; *Mullock v. Mulock*, 20 W. R. (M. R. Ir.) 696, overruling *Morrell v. Fisher*, 4 De G. & Sm. 422.

It has been determined, that an *express charge of some particular debts, as simple contract debts, or legacies on the personality for the payment of which, without such charge, it would be primarily liable, will not, according to the maxim "expressio unius est exclusio alterius," raise a presumption sufficiently clear that it is only to be the auxiliary fund for payment of other charges not expressly charged upon it, but which are charged upon the land. See *Brydges v. Phillips*, 6 Ves. 567, and *Watson v. Brickwood*, 9 Ves. 447, in which case a testator devised his real estate to a trustee upon trust for his nephews, W. W. and R. B., for life with remainders over. He then gave legacies to several nieces in blank, payable at the end of a year after his death, by his executor, and bequeathed all and singular his goods, chattels, personal estate, and effects, whatsoever and wheresoever, not therein-before disposed of unto his said nephew W. W., his executors, administrators, and assigns, he paying thereout all and singular legacies, and *all his funeral expenses and simple contract debts*. The testator, then noticing that he was indebted, by *mortgages and bonds*, for money borrowed to pay for some of the estates he had purchased, directed that those debts should be paid by the devisees in equal proportions; and, after giving an annuity to a servant out of the real estate, *he appointed his nephew, W. W., his executor*. The will, it must be observed, does not charge the real estate with any debts; but the testator, by a codicil, appointed a trustee in the place of the one named in the will, and empowered the new trustee, "in order to raise money for the payment of *all and singular his debts and legacies, to mortgage*, with the approbation of the taker for the time being of his estates, a competent part of his said freehold estates, for so much money as should be necessary for that purpose; and he directed his trustees for the time being to keep down the interest;" and by another codicil he appointed another trustee, and gave other legacies. It was contended, that the personal estate was exonerated from the debts and legacies, or, at any rate, was liable only to the simple contract debts. Sir W. Grant, M. R., admitting that there was some indication of an intention to exonerate the personal estate, observes: "But it is not so conclusive as to come up to the requisition of the rule laid down by Lord Thurlow, in *The Duke of Ancaster v. Mayer*; that is, a *plain intention*. By directing that the executor, to whom he gives all his personal estate, shall pay thereout all the legacies, funeral expenses, and simple contract debts, prima facie there is some appearance of an intention that he does not mean the personal estate to be liable to debts by specialty. But that alone, upon the authorities, is not sufficient." In *Bootle v. Blundell*, 1 Mer. 230, Lord Eldon, says, with respect to this case, that

[*650] it was *rightly decided, taking the will and codicil together. "But if," said his Lordship, "the codicil had not existed, there are circumstances which appear to me to be such as might have given occasion to some observations which do not occur either in the judgment or in the argument: still, I repeat that I think that case was rightly decided." See, also, *Davies v. Ashford*, 15 Sim. 42.

A bequest of *all* the personal estate (with or without an enumeration of particulars), as distinguished from a mere general residuary bequest, will not, at any rate, *where the legatee is also appointed executor*, exonerate the personalty passing under such bequest, although lands are devised in trust to pay all the testator's debts. See *Harewood v. Child*, stated Ca. t. Talb. 204; *Haslewood v. Pope*, 3 P. Wms. 324; *Brummel v. Prothero*, 3 Ves. 111; and *Aldridge v. Lord Wallscourt*, 1 Ball & B. 312, in which case all the personal estate was given to the executor, one of the trustee of the real estate, in trust for the legatee. The cases, therefore, of *Kynaston v. Kynaston*, *Holliday v. Bowman*, *Bamfield v. Wyndman*, cited in the principal case, may be considered as overruled.

The inference against the exoneration of the personal estate, when the legatee is also the executor, arises upon the assumption that he takes the personal estate in that character, with all the burthens attached to it, in a regular course of administration.

And it has been decided that the personalty will not in similar cases be exonerated where the legatee is *not* executor: *Collis v. Robins*, 1 De G. & Sm. 131; *Ouseley v. Anstruther*, 10 Beav. 453.

But, in some cases, the distinction between a mere residuary bequest, and a gift of *all* the personal estate, has been considered important. Thus, in *Tower v. Lord Rous*, 18 Ves. 138, Sir W. Grant, M. R., observed, "That there was nothing except the common residuary clause—'all the rest and residue of my personal, of what nature or kind soever;' not 'all my personal estate,' not 'all which I have not hereinbefore disposed of,' or any other of those forms which in several cases have been held to denote an intention to give the personal estate as a specific bequest." And in *Bootle v. Blundell*, 1 Mer. 228, Lord Eldon, C., with reference to the clause in the principal case, by which the testator gives to his brother "his household goods, and all other his goods, chattels, effects, and personal estate, whatsoever and wheresoever," if he should be living at the testator's decease, observes, that on those words a great deal of argument might have been raised as to the distinction between a gift of residue, as residue, and a bequest of enumerated particulars followed [*651] by the words, "and personal estate whatsoever," not "and all the residue of my personal estate:" but that such argument was put out of the question, in that case, by a subsequent clause, in which he expressly refers to this as "the devise of the residue of his personal estate."

And, accordingly, in many recent cases, where the personalty has been

bequeathed, not as a residue, but as a whole, and *the debts and funeral and testamentary expenses* have been charged upon the real estate the real estate has been held the primary fund for their payment. See *Greene v. Greene*, 4 Madd. 148; *Michell v. Michell*, 5 Madd. 69; *Driver v. Ferrand*, 1 Russ. & My. 681; *Blount v. Hipkins*, 7 Sim. 43; *Jones v. Bruce*, 11 Sim. 221; *Coote v. Coote*, 9 Ir. Eq. Rep. 197; 3 J. & L. 175; *Lance v. Aglionby*, 27 Beav. 65; *Gilbertson v. Gilbertson*, 34 Beav. 354.

So where the personal estate has been bequeathed in a similar manner, and the debts, general and testamentary expenses have been thrown upon a particular real estate, devised upon trust for their payment, such particular estate will be the primary fund for their payment; and if other real estate has been specifically bequeathed, not charged with debts, such last-mentioned real estate and the personal estate (being specifically bequeathed) must contribute rateably towards the payment of the debts. See *Powell v. Riley*, 12 L. R. Eq. 175. There a testator bequeathed all his household goods and furniture, farming stock, money and securities for money, goods, chattels, and effects, and all other his personal estate to his wife absolutely. He then devised a freehold estate, called the Rye Crofts, to trustees upon trust for sale, and out of the proceeds thereof to pay his debts, funeral and testamentary expenses, and the *residue* (if any) to his wife. He then devised one freehold estate to his wife absolutely, and other estates to his wife for life, with remainders over. The Rye Crofts estate was insufficient for the payment of the debts. It was held, by Sir R. Malins, V. C., that the bequest of the personalty to his wife was specific, that the Rye Crofts Estate, the primary fund for payment of the debts being exhausted, the personal estate specifically bequeathed to his wife, and the two other specifically bequeathed real estates must contribute rateably to the payments of the debts remaining unpaid.

The principle, however, of these cases will not be applicable where a testator subjects his personal as well as his real estate to the payment of his debts, funeral and testamentary expenses: *Paterson v. Scott*, 1 De G. Mac. & G. 531.

But a testator may by implication take away the primary liability of the personal estate, if he clearly shows his intention to *place [*652] it elsewhere; thus in *Webb v. Jones* (2 Bro. C. C. 60; 1 Cox, 245), the testator devised his real estate to be sold, and the money to arise by the sale to be applied to pay mortgages and all other debts, the residue to be added to his personal estate, Sir Lloyd Kenyon, M. R., held the personal estate to be exonerated, upon the ground, it is presumed, that the testator clearly showed that he did not contemplate the possibility of the whole personalty being applied before the realty, which it might have been if it was to be applied in its natural order. See also *Shallcross v. Wright*, 12 Beav. 505; *Fisher v. Fisher*, 2 Kee. 610.

Again, where a testator devised an estate at Charleywood, and bequeathed certain specific chattels, upon trust to sell, and in the first place to pay all his just debts, funeral and testamentary expenses and legacies, and after giving some pecuniary legacies, the testator declared that the moneys to arise by such sale as aforesaid, *should be "the fund primarily applicable to the discharge of his said debts, funeral and testamentary expenses and legacies."* And in case it should be insufficient, the testator by a codicil charged his Highbury estate "with the payment of so much money as should be requisite to make good the deficiency," it was held by Sir J. Leach, M. R., that the personal estate was only liable after the two estates had been exhausted. "If is not necessary," said his Honor, "that there should be words expressly exempting the personal estate, if the instruments afford a clear intention on the part of the testator that it should be exempted. The Charleywood estate, and the articles to be sold therewith, are expressed to be the primary fund, and the plain intention of the testator is, that the Highbury estate should be the secondary fund :'" *Dawes v. Scott*, 5 Russ. 32. See also *Forrest v. Prescott*, 10 L. R. Eq. 545. There a testatrix gave her real estate in trust for her two daughters, I. MacCarty and M. Streff, for life, and afterwards each moiety was to go to the sons of each of her daughters and their families; and after giving various legacies she left the residue of her estate to her granddaughters. By a codicil the testatrix directed that certain debts incurred by her, for her son-in-law, J. MacCarty, should be exclusively, and in the first instance, borne by and paid out of the MacCarty moiety of her real estate, exempting the Streff moiety from payment of such debts. It was held by Sir R. Malins, V. C., that the codicil amounted to an express ex-emption of the personal estate of the testatrix; and that the moiety of her real estate devised to the MacCarty family was primarily liable to the debts. See also *March v. Fowke*, Rep. t. Finch, 414; *Bateman v. Earl of Roden*, 1 J. & L. 356; *Evans v. Evans*, *17 Sim. 106; [*653] and *Bootle v. Blundell*, 1 Mer. 193; 19 Ves. 494.

And where a testator expressly exempts his personal estate from payment of his debts, estates specifically devised not charged with payment of debts, will be applicable after real estates devised upon trust for their payment, and before resort can be had to the personal estate: *Morrow v. Bush*, 1 Cox. 185; *Young v. Young*, 26 Beav. 522.

It seems where the testator has exempted personalty which he has bequeathed from its primary liability to debts, that the exemption will not be extended for the benefit of next of kin who take the personalty in consequence of a lapse. In *Waring v. Ward*, 5 Ves. 675, Lord Loughborough, C., puts this case. "If an estate be given to A. and the personal estate to B. exempt from debts, that exemption is to be considered as intended only for the benefit of B., that he shall not pay those debts to which he would be liable if no such provision had been

made; and is not a general exemption of the personal estate. . . . Nothing can be more clear than that where an exemption is created for the benefit of a particular person, not for the benefit of the estate generally, if that person cannot take it, the benefit never arises." See also *Hale v. Cox*, 3 Bro. C. C. 322; *Hancox v. Abbey*, 11 Ves. 179; *Noel v. Lord Henley*, 7 Price, 241; Dan. 211; but see and consider *Milnes v. Slater*, 8 Ves. 295—305; *Fisher v. Fisher*, 2 Kee. 610.

No inference of intention to exonerate the personalty arises from the appointment of an executor, who, there being no bequest of the personalty, was entitled to it by such nomination, although the debts and funeral expenses are thrown upon the land (*Gray v. Minnethorpe*, 3 Ves. 103, 104); nor where he is a trustee of it for the next of kin (*M'Clelland v. Shaw*, 2 S. & L. 538, 543); upon the principle, that there is no specific disposition of the residuary personal estate.

But it is clear that the executor may take the personal estate, either beneficially or as trustee for the next of kin, exonerated from the payment of debts and legacies, if another fund is provided for their payment, and the personalty has, by express words, been exempted: *Milnes v. Slater*, 8 Ves. 305.

Where there is a simple gift of an annuity or legacy, followed by a charge thereof upon the real estate, the personal estate in such case is primarily liable, and the real estate is only charged in aid of the personal estate. See *Paget v. Huish*, 1 Hem. & Mill. 663, 667.

So where there is a general charge of legacies upon land, or a devise in trust to pay legacies generally, the personal estate will be *the primary fund for their payment; as if A. devised real estate [*654] upon trust to sell and pay legacies, and afterwards gave B. a legacy of 1000*l.*, A.'s personal estate will be the primary, his real estate the auxiliary fund only for its payment; *Kirke v. Kirke*, 4 Russ. 449.

But a testator may show that it is his intention to make legacies payable out of another fund: *Greaves v. Powell*, 2 Vern. 248; *Boughton v. Boughton*, 1 H. L. Cas. 406; *Whieldon v. Spode*, 15 Beav. 537; *Lance v. Aglionby*, 27 Beav. 65. In *Woodhead v. Turner*, 4 De G. & Sm. 429, it was held upon the language of the will, that an annuity was primarily payable out of specifically devised real estates. And see *Ion v. Ashton*, 28 Beav. 379; *Daunt v. Daunt*, 13 Ir. Ch. Rep. 175; *Allan v. Gott*, 7 L. R. Ch. App. 439, 26 L. T. Rep. (N. S.) 412.

Where there is a trust to pay particular sums out of real estate, as if A. devise real estate to B. upon trust to pay 1000*l.* to C., such sum is considered as part of the real estate, and the personal estate will not, even upon a deficiency of the real estate, be liable to the payment of it (*Spurway v. Glynn*, 9 Ves. 483; *Hancox v. Abbey*, 11 Ves. 179; *Gittins v. Steele*, 1 Swanst. 24; *Lamphier v. Despard*, 2 D. & W. 59; 1 C. & L. 200; *Dickin v. Edwards*, 4 Hare, 273; *Bateman v. Lord Roden*, 7 Ir. Eq. Rep. 240, 1 J. & L. 368; *Jones v. Bruce*, 11 Sim. 221;

Ashby v. Ashby, 1 Coll. 549; *Roberts v. Roberts*, 13 Sim. 336; *Evans v. Evans*, 17 Sim. 102; *Coard v. Holderness*, 22 Beav. 391; *Gordon v. Duff*, 28 Beav. 519; and should the testator sell the estate out of which the sum is to be paid, the legacy will be adeemed; *Neubold v. Roadnight*, 1 Russ. & My. 677.

Where, however, the legacy appears to be demonstrative, there the specific fund pointed out for its payment, whether real or personal, is primarily liable, but upon its failure the general legacy will be payable out of the general assets; *Savile v. Blacket*, 1 P. Wms. 778; *Attorney-General v. Parkin*, Amb. 566; *Cartwright v. Cartwright*, cited 2 Bro. C. C. 114; *Roberts v. Pocock*, 4 Ves. 150; *M'Clelland v. Shaw*, 2 S. & L. 538; *Smith v. Fitzgerald*, 3 V. & B. 2; *Walker v. Laxton*, 1 Y. & J. 557; *Mann v. Copland*, 2 Madd. 232; *Fowler v. Willoughby*, 2 S. & S. 354; *Wilcox v. Rhodes*, 2 Russ. 452; *Colville v. Middleton*, 3 Beav. 570; *Fream v. Dowling*, 20 Beav. 624; 4 L. R. Eq. 145 I.; *Williams v. Hughes*, 24 Beav. 474; and see note to *Ashburner v. Macguire*, vol. ii. post.

But it appears that a devise of real estate, upon trust to raise a certain sum for payment of debts (*Clutterbuck v. Clutterbuck*, 1 My. & K. 15), or to pay a particular debt to which the personal estate is also liable, will render the real estate the primary fund for the payment of such sums: *Hancox v. Abbey*, 11 Ves. 179; *Welby v. Rochcliff*, [*655] 1 Russ. & My. 571; *Evans v. Cockeram*, 1 Coll. 428; *Bateman v. Earl of Roden*, 1 J. & L. 356; *Coote v. Coote*, 3 J. & L. 178. See *vide Noel v. Lord Henley*, 7 Price, 241; *S. C.*, Dan. 211, there Richards, C. B., observed, "That he could not make any distinction between a direction that real estate should be chargeable with a particular debt of 20,000*l.*, and a devise of real estate subject to all the testator's debts; for the 20,000*l.* was only part of those debts." See, however, the remarks on this case in Lord St. Leonards' work on the Law of Property, p. 363.

Where a specific personal fund is subjected to charges (which otherwise would fall upon the general personal estate), as debts, legacies, funeral and testamentary expenses, such specific fund will not be the auxiliary, but the primary source for their payment. (See *Broune v. Groombridge*, 4 Madd. 495; *Choat v. Yeates*, 1 J. & W. 102; and see *Phillips v. Eastwood*, 1 L. & G. t. Sugd. 294; *Evans v. Evans*, 17 Sim. 106; *Webb De Beauvoisin*, 31 Beav. 573; *Gilbertson v. Gilbertson*, 34 Beav. 354; *Coventry v. Coventry*, 2 Drew. & Sm. 470; except when the residue is undisposed of, in which case it will be primarily liable. Thus, in *Hewett v. Snare* (1 De G. & Sm. 333), where a testator had bequeathed specific chattels to his widow, charged with payment of a pecuniary legacy and of all his just debts and funeral and testamentary expenses, and bequeathed other specific and pecuniary legacies, but made no residuary bequest, it was argued that, if it could be con-



strued as a charge, only in the event of the general residue being insufficient, the words would be inoperative: and *Choat v. Yeates* (1 J. & W. 102), and *Browne v. Groombridge* (4 Madd. 495), were cited. Sir J. L. Knight Bruce, V. C., said, that "in both those cases there was a residuary bequest. In the case then before the Court, the words of the will would not be inoperative if they were construed as charging the property bequeathed to his widow in preference to other specific legacies, but not in preference to undisposed of residue." And his Honor was of opinion that there was not a sufficient indication of an intention to exonerate the residuary estate. See also *Holford v. Wood*, 4 Ves. 76; *Newbegin v. Bell*, 23 Beav. 386.

Although the payment of debts is thrown by a testator upon a particular fund, and he devises or bequeaths other property discharged from such debts, if the particular fund should prove insufficient for payment of debts, the other property will be applicable for that purpose in the usual order. See *Lord Brooke v. Earl of Warwick*, 1 H. & T. 142; there a testator devised an estate (which *he had mortgaged), and bequeathed specific personal property, and his [*656] residuary personal estate to different persons, *freed and discharged* from his debts, &c., and he devised real estate to trustees, upon trust to sell and pay his debts. The estate devised for payment of debts was insufficient for that purpose. It was held by Lord Cottenham, C., affirming the decision of Sir J. L. Knight Bruce, V. C. (reported 2 De G. & Sm. 425), that the residue was primarily liable, and that the devisees of the mortgaged estates were entitled to exoneration thereout. "The only way," said his Lordship, "in which this case was attempted to be argued was this: that the gift of the residue was a specific gift. This is founded on the supposition that the testator has disposed of it as a particular fund. There may be many cases where residuary clauses must be considered, not as general dispositions of the residue, but as dispositions of the residue of a particular fund; and such gifts would be equally specific with gifts of other parts of the fund. In an ordinary gift of the residue, part to A. and part to B., and the residue to C., C. is as much a specific legatee as either of the former legatees A. or B. But this is a general gift of the residuary estate. What, then, is a residuary estate? That which remains after payment of the debts. The testator gives it discharged from his debts; but he cannot do that, unless he provides for the payment of them by other means. Therefore, if he has expressed an intention of doing what he is incapable of effecting, it must fail." See also *Powell v. Riley*, 12 L. R. Eq. 175.

When mortgaged Estates are entitled to be exonerated.—The law upon this subject has been materially altered by 17 & 18 Vict. c. 113, amended by 30 & 31 Vict. c. 69. It is proposed, therefore, to consider,

first, the law as applicable to cases not coming within the Act; and then to notice the Act itself, and the alterations which it has effected.

First, then, as to cases not coming within the operation of the Act: it is clear in accordance with the general rule, by which the personal estate is the primary fund for payment of debts, unless by express words or manifest intent it is exempted, that the personal estate is the primary fund for payment of a mortgage debt *contracted by a deceased person himself*; and, whether the estate descends or is devised, the heir-at-law in the one case, and the devisee in the other, is entitled to have the land exonerated from the mortgage debt by the primary application of the general personal assets, so far as they will extend, unless, in the case of a devise, it appears from the will to have been the testator's intent that the land should be taken cum onere. See **Davies v. Bush*, 4 Bligh, N. S. 305, and note.

Although, as before observed, a devise or charge for payment of debts generally, will not render the real estate primarily liable, it seems that a devise of land in mortgage charged with, or in trust to sell for, payment of the mortgage debt, although it be the testator's own debt, will show his intention to exonerate the personalty, and render the mortgaged estate primarily liable: *Evans v. Cockeram*, 1 Coll. 428; *Hancox v. Abbey*, 11 Ves. 179. So where there is a devise to a person of an estate "he paying the mortgage thereon:" *Lockhart v. Hardy*, 9 Beav. 379. See also *Mead v. Hide*, 2 Vern. 120; *Bridgeman v. Dove*, 3 Atk. 201.

But a devise *subject* to the mortgage or incumbrance thereon, is not considered indicative of an intention to render the real estate primarily liable, but merely descriptive of the state of the property; it will not, therefore, exonerate the personal estate: *Serle v. St. Eloy*, 2 P. Wms. 386; *Astley v. The Earl of Tankerville*, 3 Bro. C. C. 545; *S. C.*, 1 Cox, 82; *Milnes v. Slater*, 8 Ves. 306; *Bootle v. Blundell*, 1 Mer. 227; *Noel v. Lord Hanley*, Dan. 336; *Goodwin v. Lee*, 1 K. & J. 377. See also *Wythe v. Henniker*, 2 My. & K. 635; *Bickham v. Cruttwell*, 3 My. & Cr. 763; *Townshend v. Mostyn*, 26 Beav. 72, 76; *Newhouse v. Smith*, 2 Sm. & Giff. 344.

In the principal case, indeed, Lord Thurlow says, that as the testator had positively given the leasehold estate *subject* to the debt thereon, if another estate had been appropriated to payment of his debts, and it had been *his debt* upon the estate, he should have concurred with the Lords Commissioners in thinking the debt a primary charge on the estate. But Lord Eldon, has observed, in *Bootle v. Blundell*, 1 Mer. 227, with reference to the remark of Lord Thurlow, that "if, in *The Duke of Ancaster v. Mayer*, the mortgage debt of 6500*l.* upon the leasehold estate devised to the testator's brother, had been a debt of the testator's own, it seems to be very certain, from *Serle v. St. Eloy*, 2 P. Wms. 386, and other cases, that his giving the leasehold estate *subject* to the mort-

gage would not have constituted it the primary fund for the payment of that debt." See, also, *Galton v. Hancock*, 2 Atk. 437; *Astley v. Tankerville*, 3 Bro. C. C. 545; 1 Cox, 82; *Bickham v. Cruttwell*, 3 My. & Cr. 763.

Where, however, the mortgage debt is not the personal debt of the devisor or ancestor, but of a previous owner of the mortgaged estate, the mortgaged estate is the primary, and the personal estate merely the auxiliary and collateral fund for its payment; and consequently the heir-at-law or devisee, will take such estate cum onere, unless the mortgage debt *has been adopted by the devisor or ancestor as his own, in which case the rule, that the personal estate is the primary fund for its payment, applies: *Scott v. Beecher*, 5 Madd. 96. And see *Earl of Clarendon v. Barham*, 1 Y. & C. C. C. 688. [*658]

What Acts do not amount to an Adoption of a Mortgage Debt by the Owner of the Estate.—There is considerable difficulty in ascertaining what acts amount to an adoption of the debt. The following acts have been held not to be sufficient:—If the heir or devisee, upon a transfer of the mortgage, enters into a personal covenant with, or executes a bond to, the new mortgagee for the payment of the mortgage debt, if he does it only for that purpose, it has been frequently determined not to make it the personal debt of the party whose original debt it was not (*Bagot v. Oughton*, 1 P. Wms. 347; *Evelyn v. Evelyn*, 2 P. Wms. 664; see Cox's note *Leman v. Newham*, 1 Ves. 51; *Lacam v. Mertins*, 1 Ves. 312; *Robinson v. Gee*, 1 Ves. 251; *The Earl of Ilchester v. The Earl of Carnarvon*, 1 Beav. 209; *Hedges v. Hedges*, 5 De G. & Sm. 330; and see and consider *Barham v. Earl of Thanet*, 3 My. & K. 607; *Bruce v. Morice*, 2 De G. & Sm. 389);—nor if, as in the principal case he obtains a small further advance, and gives an additional real security for the whole sum due;—nor where he has entered into a covenant to pay a higher rate of interest (*Shafto v. Shafto*, 2 P. Wms. 664, n.; 1 Cox, 207; see vide *Woods v. Huntingford*, 3 Ves. 128; *Lushington v. Sewell*, 1 Sim. 435);—nor where he obtains an additional advance to pay off arrears of interest on a mortgage and the simple contract debts of the person from whom he takes the estate (*Earl of Tankerville v. Fawcett*, 1 Cox, 237);—nor will a mortgage by the heir or devisee of lands, devised or descended, subject to payment of the debts or legacies of the ancestor or devisor, in order to secure their debts or legacies, be considered as the debt of the heir or devisee: *Perkyns v. Baynton*, 2 P. Wms. 665, Cox's note; *Basset v. Percival*, 1 Cox, 268; *Noel v. Lord Henley*, 7 Price, 241; *S. C.*, Dan. 211; *Hamilton v. Worley*, 2 Ves. jun. 62; *Earl of Tankerville v. Fawcett*, 1 Cox, 237, 2 Bro. C. C. 57. Nor will a charge by an heir or devisee of his estate with payment of his debts be considered as an adoption of the mortgage debt of his ancestor or the devisor from whom he took the estate: *Lawson v. Lawson*, 3

Bro. P. C. Toml. Ed. 424; *Hamilton v. Worley*, 2 Ves. jun. 62, 4 Bro. C. C. 199; *Lawson v. Hudson*, 1 Bro. C. C. 58.

Where a man buys subject to a mortgage, and has no connection, or contract, or communication with the mortgagee, and does no other act [*659] to show an intention to transfer *the debt from the estate to himself, as between his heir and his executor, but merely that which he must do if he pays a less price for it in consequence of that mortgage—that is, indemnifies the vendor against it—he does not by that act, take the debt upon himself personally: *Woods v. Huntingford*, 3 Ves. 132, per Sir R. P. Arden, M. R.: and although he agrees or covenants with the vendor to pay the mortgage debt, he does not thereby make it his own debt, but it remains a charge upon the estate, or rather a debt of his in respect of the estate only: *Tweddell v. Tweddell*, 2 Bro. C. C. 101, 152; *Butler v. Butler*, 5 Ves. 534; *Barry v. Harding*, 1 J. & L. 475. Sed vide *Parsons v. Freeman*, 2 P. Wms. 664, Cox's note.

What acts amount to an Adoption of a Mortgage Debt by the Owner of the Estate.—The following acts have been held to amount to an adoption of the debt:—Where the owner of property adds mortgages of his own to other mortgages created by his ancestor, and unites them together, and makes himself personally liable for the payment of the aggregate sum, the whole mortgage debt then becomes his debt: *Townshend v. Mostyn*, 26 Beav. 72, 76; and see *Bagot v. Bagot*, 34 Beav. 134; 10 Jur. (N. S.) 1169; 13 W. R. (M. R.) 169.

Where the purchaser of the equity of redemption enters into a covenant with the mortgagee to pay him the mortgage debt, and there is a new proviso for redemption on payment, he will be considered to have adopted the debt as his own: *Earl of Oxford v. Lady Rodney*, 14 Ves. 417; *Woods v. Huntingford*, 3 Ves. 128; *Barry v. Harding*, 1 J. & L. 485, 486.

Again, if a person bought an estate, and thereby contracted a debt with the vendor, and, for the purpose of securing it, gave a charge on the estate, and entered into a covenant to pay it, it would be the personal debt of the purchaser, and his personal estate would be primarily liable to pay it. And it will make no difference whether the purchase-money was to be paid in a gross sum or from time to time, by way of annuity for life; it is equally a debt and charge upon the personal estate, and in either case the personal estate is the primary fund to pay it: *Yonge v. Furze*, 20 Beav. 380, 383. But although the mere purchase of an estate subject to charges as an equity of redemption, does not make the personal estate of the purchaser liable to the charge, if the charge is part of the price, then the personal estate is liable.—Per Lord Thurlow, C., in *Billinghurst v. Walker*, 2 Bro. C. C. 608, recognizing the doctrine laid down in *Cope v. Cope*, Salk. 449; and *Bel-*

videre v. Lord Rochfort, Wallis Rep. by *Lyne, 45; 5 Bro. P. C. 299, Toml. Ed. Sed vide *Tweddell v. Tweddell*, 2 Bro. C. C. [*660] 107, where Lord Thurlow disapproves of that case. See also *Woods v. Lord Huntingford*, 3 Ves. 131. And see and consider *Waring v. Ward*, 7 Ves. 337; *Barry v. Harding*, 1 J. & L. 475.

Where a mortgaged estate comes into the hands of a person who is executor and residuary legatee of the mortgagor, as well as heir or devisee of the mortgaged estate, upon the death of such person the mortgage debt is a primary charge on the real estate. The leading case upon this subject is *Scott v. Beecher*, 5 Madd. 96; there the owner of copyholds, which he had mortgaged, devised them to his wife in fee, and gave to her his personal estate, and made her his residuary legatee and executrix. The wife died intestate without paying off the mortgage. It was held by Sir John Leach, V. C., that her heir was not entitled to have the mortgage paid out of the personal estate. "The widow," said his Honor, "was devisee of the copyhold estate, and was also residuary legatee and executrix of the mortgagor. If she had thought fit, she might have paid off the mortgage out of the personal estate of her husband, for it is admitted she possessed assets sufficient to pay all the debts, including the mortgage, and *it may therefore be said that she elected to continue the mortgage as a charge on her real estate*. But I apprehend this is not a case in which her personal representative is bound to make out any such fact of election. By the gift to her as residuary legatee, the personal estate of the testator became her personal estate, but the mortgage debt of the testator was not her debt, and her heir therefore has no equity to pay off this mortgage out of her personal estate." So likewise in the recent case of *Swainson v. Swainson*, 6 De G. Mac. & G. 648, a testator who had mortgaged his estates, gave all his real and personal estate to his wife, and made her executrix. She died without having paid off the mortgages. It was held by Lord Cranworth, C., affirming the decision of Sir J. Stuart, V. C., that her heir took the mortgaged estates cum onere. "Some propositions," said his Lordship, "connected with the case admit of no doubt. If the owner of an estate mortgaged it and died, and the representative of his real estate was a different person from the representative of his personal estate, in this case the real estate would be exonerated from the debt at the expense of the personalty. Again, where the real and personal representative of the mortgagor was the same person, no question could arise. What, however, was to happen if the estate having come to some person, that person died, and his representatives were different, his *real estate going to one person and his personal to another? It was here that the question arose. Without [*661] saying whether there might be a preference in 'favour of the rule being' one way rather than another, the only point of importance was that some rule should be established. I have always understood the rule to

be that when an estate in mortgage had once come to the hands of a person filling the character both of real and personal representative of the mortgagor, then the charge became a debt of that person, and was only an incumbrance on the estate. That was the rule laid down in *Scott v. Beecher*, and it was acted on by Lord Lyndhurst, in *Evans v. Smithson* (cited 1 Y. & C. C. C. 701). The particulars of that case were not known, but the rule was also followed by Lord Langdale in *The Earl of Ilchester v. The Earl of Carnarvon*, 1 Beav. 209; and again, although with reluctance, by the present Lord Justice Knight Bruce in *The Earl of Clarendon v. Barham*, 1 Y. & C. C. C. 688; it was again recognized and followed by Lord Truro in *Hickling v. Boyer*, 3 Mac. & G. 635, 644."

It has, however, been recently decided that where the same person becomes entitled to the mortgaged estate, and also to the personal estate of the mortgagor upon his intestacy, on the death of such person intestate, without having taken out letters of administration, his heir will be entitled to have the mortgaged estate exonerated. See *Bond v. England*, 2 K. & J. 44; there James England mortgaged real estate, and died intestate in 1850, leaving his father, Edward England, heir-at-law, and sole next of kin. Edward England died intestate, and without having obtained letters of administration of the personal estate of his son. It was held by Sir W. Page Wood, V. C., that the personal estate of the son was liable, as between the heir and personal representative of the father and son, to be applied in discharge of the mortgage debt in exoneration of the real estate. "It appears to me," said his Honor, "that the authorities which have decided that when the same person who is heir or devisee of the mortgaged estate is also executor and residuary legatee, and has both the funds and the legal right to pay himself, his heir is not entitled to have the mortgaged estate exonerated, do not go far enough to enable me to hold that the administrator of Edward, who was entitled only to so much of the entire personalty of James as fell to him by the effect of intestacy after all the debts of James were paid, can claim James's personalty until the mortgaged debt is discharged, or to hold even if the mortgagee had chosen to sell [*662] the security, so that the debt has been in a *manner discharged; that the defendant, claiming as heir of James as well as of Edward, has not a right to say 'the personalty of James never came to Edward, it remains unadministered, and I am entitled to have it applied in relieving the mortgaged estate from James's debt.' The case is new in this particular. The views on the general doctrine have been very various; but the latter decisions have proceeded upon the ground that the same party had both funds under his control. I cannot say that this was the case here, and I must therefore decide in favour of the defendant, who applies to have the mortgaged estate exonerated."

In *Hatch v. Skelton* (20 Beav. 453), a testatrix, the owner of a free-

hold estate, subject to a mortgage in fee to secure 1300*l.*, devised and bequeathed her real and personal estate to Angell, the *mortgagee*, who, in his residuary account as her executor, represented the balance of the estate as being 467*l.*, and added, "The executor will appropriate this balance towards payment of the mortgage of 1300*l.* due to himself." Afterwards Angell devised the estate to a niece and two sisters of the testatrix, "provided they undertake to receive the same with all the liabilities attaching thereunto." It was held by Sir John Romilly, M. R., first, that under the circumstances the mortgage had not merged in the fee; and, secondly, that the niece and two sisters of the testatrix took the estate subject to the payment of the balance of the mortgage debt. See also *Byam v. Sutton*, 19 Beav. 556.

Again, where the money due upon mortgage is a mere charge, in order to secure a portion or jointure, although accompanied by a covenant to pay on the part of the owner of the estate, it will be held to be a debt to which the estate charged, and not the personal estate, will be primarily liable. See *Coventry v. Coventry*, 2 P. Wms. 222, 1 Stra. 596; *Edwards v. Freeman*, 2 P. Wms. 437; *Lanoy v. The Duke of Athol*, 2 Atk. 444; *Lechmere v. Charlton*, 15 Ves. 193; and *Loosemore v. Knapman*, Kay, 123: there a man by his marriage settlement covenanted to secure his intended wife an annuity by way of jointure "in manner hereinafter expressed," and he demised certain real estate to trustees for a term, upon the trusts thereinafter declared; and then covenanted that his heirs, executors, administrators, or assigns should pay the jointure to the wife, and it was thereby declared that the demised lands were to be held upon trust for settlor until some default in making any of the payments of the jointure; and in case of non-payment of any part for forty days next after any day of payment, then upon trust to secure the same. It was held by Sir *W. P. Wood, V. C., that as between the real and [*663] personal representatives of the settlor the land was the primary fund for the payment of the jointure. "I think," said his Honor, "there is a distinction to be found in the cases; that I am bound in principle to hold that this is a charge primarily on the real estate. First of all, there is a decision of Lord Hardwicke in *Lanoy v. The Duke of Athol*, 2 Atk. 444. I believe there are prior cases, but that is the leading case on the subject. He says in effect that although where there is a covenant for payment the personal assets are first charged, this is not extended to provisions in a settlement, and the ground must be that pointed out in *Lechmere v. Charlton*, 15 Ves. 193, that in a security of this description *there is not any benefit accruing to the personal estate of the party who is debtor*, but the whole arrangement is merely for the purpose of securing a jointure or portion, and *the personally not having received any benefit*, the true intent is that the real, and not the personal estate should be the primary fund. That was the ground of the

decision in *Graves v. Hicks*, 6 Sim. 398. In that case there was an agreement to secure a sum of 6000*l.* by way of mortgage, and the Vice-Chancellor takes a distinction which is nice, but of some importance as to what would have been the effect if the wording there had been different—if it had been an agreement to *pay*, and not to *secure*, the 6000*l.* The use of the word '*pay*' might have been evidence of an anterior debt, as the question was, whether it was a debt at the time of the settlement. . . . I rely upon the decision of *Lanoy v. The Duke of Athol*, and the view which the Vice-Chancellor took in asking in *Graves v. Hicks*, whether any debt was due at the time? Asking the same question here, and it appearing that there was no debt, and no augmentation of the personal estate, I must hold, according to the authorities, that the transaction is to be regarded as a security made by the settlor upon his marriage, in which his personal estate taking no benefit, the onus is thrown upon those who wish to make it liable to show some reason for doing so." See the remarks of Lord Truro, C., in *Hickling v. Boyer*, 3 Mac. & G. 642, 943: and see and consider *Reeve v. Reeve*, 3 De G. & Sm. 714; *Evans v. Wyatt*, 31 Beav. 217.

But even where the personal estate has received a benefit, the real estate will be primarily liable where a tenant for life, even although he has an absolute power of appointment over the whole estate, raises a sum of money under the power for his own use, and covenants to pay it: for the inference in such a case is that he intended the real *estate, which was not absolutely his own, should pay the debt [*664] in preference to his own property: *Jenkinson v. Harcourt*, Kay, 688, 700; and see *Dolphin v. Aylward*, 15 Ir. Ch. Rep. 583. As to what would be the effect of the tenant for life becoming absolute owner by the failure of intermediate limitations, see *Scott v. Beecher*, 5 Madd. 96; *Lord Ilchester v. Lord Carnarvon*, 1 Beav. 209; *Noel v. Lord Henley*, Dan. 331, 332; *Earl of Clarendon v. Barham*, 1 Y. & C. C. C. 711.

Where a person has raised money by mortgage of an estate, which he afterwards aliens or settles upon volunteers, and more especially if he does so expressly subject to the mortgage, the natural inference from such a transaction, unless there be something in the instrument to indicate a contrary intention, is that the alienor or settlor did not mean to pay the debt out of his personal estate. If the alienation be made subject to the mortgage debt, whether the alienee be a volunteer or purchaser, the inference is, that though as between the real and personal representatives of the mortgagor, his real estate was intended to be only a collateral security, yet from the moment of alienation he has made that estate the principal debtor (*Vandeleur v. Vandeleur*, 3 C. & F. 82; 9 Bligh. N. S. 157; *Lewis v. Nangle*, 1 Cox, 240; *Ibbetson v. Ibbetson*, 12 Sim. 206; *Lady Langdale v. Briggs*, 8 De G. Mac. & G. 391); and if he were to pay off the whole or any part of the charge upon the real

estate, he would, unless he showed that he intended to make the payment in case of the real estate, be a creditor for the amount he so paid off (*Ex parte Digby*, Jac. 235; *Redington v. Redington*, 1 B. & B. 131; *Vandeleur v. Vandeleur*, 3 C. & F. 82; 9 Bligh. N. S. 157); but where the settlement contains a covenant on the part of the settlor to pay the debt, that might show his intention to render his personal estate primarily liable. See *Noel v. Noel*, 12 Price, 263, 264; *Barham v. Earl of Clarendon*, 10 Hare, 126.

As to the effect of lapse of time upon the claim to exoneration, see *Newhouse v. Smith*, 2 Sm. & Giff. 344; *Rooke v. Lord Kensington*, 21 Beav. 470; *Mellersh v. Bridger*, 17 Jur. 908.

The law relating to the exoneration of mortgaged estates having been found unsatisfactory, it has been enacted by 17 & 18 Vict. c. 113 (which does not extend to Scotland), that "when any person shall, after the thirty-first of December, one thousand eight hundred and fifty-four, die seised of or entitled to any estate, or interest in *any land or other hereditaments* which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will, deed, or other document, *have signified any contrary or other intention*, the heir or devisee to whom [*665] such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: *Provided* always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid, or otherwise; *provided* also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January one thousand eight hundred and fifty-five." (Sect. 1.)

It will be observed that this Act only comprehends "any estate or interest in any land or other hereditaments," the law therefore will remain unaltered as to the primary liability of the general personal estate, to satisfy charges on property not coming within those terms.

With regard to property the mortgage of which comes within the Act, it seems that copyholds as well as freeholds are within its provisions (*Piper v. Piper*, 1 J. & H. 91); but leaseholds for years are, by the language of the Act, which speaks of "the *heir or devisee to whom such lands or hereditaments shall descend or be devised*" (words not applica-

well v. Hyslop, 4 L. R. Eq. 407, where it was held that a Scotch heritable bond, given by a domiciled Englishman, was payable in exoneration of the estate upon which the bond was charged out of his residuary personal estate, bequeathed for payment of his "just debts." Sed vide contra, *Rowson v. Harrison*, 31 Beav. 207.

But a testator may without inconsistency *show an intention [*668] that a mortgaged estate shall be exonerated out of the personal estate, without signifying any intention that it shall be exonerated out of the other real estate; and in such case the personal estate only is applicable in payment of the mortgages: *Rodhouse v. Mold*, 13 W. R. (V. C. K.) 854; 35 L. J. Ch. 67.

Where the testator has provided other sources for the payment of the mortgages, as for instance his residuary real or personal estate, the general provisions of the Act do not apply; *Allen v. Allen*, 30 Beav. 395, 402; *Greated v. Greated*, 26 Beav. 621. And see the remarks thereon, 30 Beav. 401; *Newman v. Newman*, 31 Beav. 33; *Stone v. Parker*, 1 Drew. & Sm. 212.

In order to remove doubts arising upon the construction of 17 & 18 Vict. c. 113, the legislature passed the 30 & 31 Vict. c. 69, which enacts, that "in the construction of the will of any person who may die after the 31st day of December, 1867, a general direction that the debts, or that all the debts of the testator, shall be paid out of his personal estate, shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act (17 & 18 Vict. c. 113), unless such contrary or other intention shall be further declared by words expressly or by necessary implication, referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate. (Sect. 1.) That in the construction of the said Act and of this Act, the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator." (Sect. 2.)

As sec. 2 of this Act applies only to lands or hereditaments purchased by a "testator," the heir-at-law of an *intestate* has been held to be entitled to have the lien for unpaid purchase-money, upon an estate purchased by the *intestate*, paid for out of his personal estate: *Harding v. Harding*, 13 L. R. Eq. 493. See ante, p. 330.

If a testator wishes to give a direction which shall be deemed under 30 & 31 Vict. c. 61, a declaration of an intention contrary to the rule laid down in Mr. Locke King's Act, it must be a direction applying to his mortgage debts in such terms as unmistakably refer to or describe them. See *Nelson v. Page*, 7 L. R. Eq. 25. There J. Nelson, by will dated the 13th of August, 1835, after directing that all his just debts, funeral and testamentary expenses, should be paid by his executors thereafter named, as soon as conveniently might be after his decease, and having made several devises and bequests, finally devised and be-

queathed to his mother, Ann Nelson, her heirs, executors, administrators, and assigns, all the rest, residue, and remainder of *his estate and effects for her and their own use and benefit. Mrs. [*669] Nelson and the executors named in the will, all died in the testator's lifetime. In 1842 the testator purchased a freehold and copyhold estate in Essex, which, in 1848, he mortgaged for 2500*l.* and interest. On the 23d of July, 1868, he died. The plaintiff, who was the testator's heir-at-law and customary heir, filed a bill against the administratrix praying for a declaration that he was entitled to have the mortgage debt paid out of the personal estate. It was held by Sir G. M. Giffard, V. C., that he was not so entitled, either under 17 & 18 Vict. c. 113, or 30 & 31 Vict. c. 69. "There can be no doubt," said his Honor, "that under the old law, supposing that neither of these Acts had been passed, this heir would clearly have been entitled to exoneration. Then came Mr. Locke King's Act; and the facts to which we have to apply the provisions of that statute are, that the will was made before the 1st of January, 1855; but the person who claims this property as heir claims it as the heir of a person who did not die till after 1867. Now Mr. Locke King's Act provides in substance as follows:—That when any person shall, after 1854, die seised of land charged with a mortgage debt, and such person shall not by his will have signified any contrary or other intention, the heir or devisee to whom such land shall descend or be devised shall not be entitled to have the mortgage debt discharged out of the personal estate. There, if we stop without going to the following proviso, it is plain that heirs and devisees are both within the Act. But then comes the proviso that nothing therein contained shall affect the rights of any person 'claiming under or by virtue of any will' made before the first of January, 1855. Now it is plain that this proviso extends to the case of a *devisee only*. It is plain that the only person intended to be excepted by this proviso out of the Act, is a devisee under a will made prior to 1855. It follows, therefore, that this heir comes within the operation of the statute, although the devisee, had she lived, would not have done so.

"Then comes the question, whether in these two Acts, taken together, there is to be found anything which will take away the effect of the declaration to be found at the commencement of this will, that all the testator's just debts are to be paid by his executors out of his personal estate. We all know the direction which was given to the current of the decisions on this subject. There were, at length, so many of them that they came to be established as law, and in the end gave rise to the passing of the statute of 1867. I think the language of that statute is *reasonably plain, though it is not, perhaps, so happily expressed [*670] as it might be.

"The Act of 1867 says, that in the construction of the will of any person who may die after 1867, a general direction that the debts shall be

paid out of the personal estate shall not be deemed to be a declaration of an intention contrary to the rule established by Mr. Locke King's Act, unless such contrary or other intention be further declared by words expressly, or by implication, referring to all or some of the testator's mortgage debts. The meaning of that appears to be this—that if a testator wishes to give a direction which shall be deemed a declaration of an intention contrary to the rule laid down by Mr. Locke King's Act, it must be a direction applying to his mortgage debts, in such terms as distinctly and unmistakably to refer to or describe them. I cannot say that there is in this will a direction of that kind, and I cannot, therefore, hold that the estate in the hands of the heir is exonerated from the payment of the mortgage debt." See also *Lewis v. Lewis*, 13 L. R. Eq. 219, 227.

It seems that land devised upon trusts for conversion, and taken in its converted state, is not an "interest in land" within the meaning of Locke King's Act: *Lewis v. Lewis*, 13 L. R. Eq. 218.

Where freeholds and leaseholds have been mortgaged together, they must, if not exonerated, as between the heir and administrator of the mortgagor, bear the burthen rateably (*Evans v. Wyatt*, 31 Beav. 217; and see *Heveningham v. Heveningham*, 2 Vern. 355; *Lipscomb v. Lipscomb*, 7 L. R. Eq. 501; *De Rochefort v. Dawes*, 40 L. J., N. S. (Ch.) 625); but where an estate is only charged in aid of another, the latter will be primarily liable: *Stringer v. Harper*, 26 Beav. 33.

Where there were two estates comprised in the same mortgage, and the mortgagor had specifically devised one of them by name, leaving the other to pass by a residuary devise in his will, it was held by Lord Romilly, M. R., that the latter estate was primarily liable to the whole of the mortgage debt. This was decided in *Brownson v. Lawrance*, 6 L. R. Eq. 1, where his lordship observed, "The question is whether as between these two properties Locke King's Act applies, which enacts 'that unless the testator has, by his will, signified any contrary or other intention, the mortgaged property shall, as between the different persons claiming through or under him, be primarily liable to the payment of the mortgage debt, every part thereof according to its value, bearing a proportionate part of the mortgage debts charged on the whole [*671] thereof.' I am of opinion that, as between these *two estates, the Act does not apply, and that the fact of the testator having specifically devised part of the mortgaged estate, and left the other part to pass by the general residuary gift, is of itself an expression of his intention, that the part which passes by the residuary gift shall be primarily liable to the payment of the whole of the mortgage debt in exoneration of the part which is specifically devised."

The case of *Brownson v. Lawrance* was not followed in the recent case of *Gibbins v. Eyden*, 7 L. R. Eq. 371, there the owner of two estates, called the Bugbrooke and Heyford estates, subject to the same

mortgage, specifically devised the former of them, and left the latter to pass by a residuary devise. It was held by Sir R. Malins, V. C., that the residuary devise was specific, and that the two estates ought therefore to bear the mortgage debt rateably. "The decision of the Master of the Rolls, in *Brownson v. Lawrance*, 6 L. R. Eq. 1," said his Honor, "was much pressed upon me to show that the devisees of the Heyford estate are bound to exonerate the devisee of Bugbrooke from the mortgage debt. The decision evidently proceeded on the ground that a residuary devise of land was not specific, as his Lordship himself had decided in the two cases of *Rotheram v. Rotheram*, 26 Beav. 465), and *Bethell v. Green* (34 Beav. 302); and though *Brownson v. Lawrance* was decided three months after Lord Chelmsford had reversed the decision of Vice-Chancellor Kindersley in *Hensman v. Fryer* (2 L. R. Eq. 627, reversed 3 L. R. Ch. 420), and thereby overruled *Rotheram v. Rotheram*, and *Bethell v. Green*; and though the decision of Lord Chelmsford was cited, he did not advert to it in his judgment. I am satisfied that his decision would have been different if he had considered that case, for it settles that an estate passing by a residuary clause is specifically devised, and consequently takes away the ground of the decision."

Where a testator, possessed of various leasehold estates, some of which were mortgaged, and others not, specifically bequeathed the latter to the plaintiff, and the former to other parties; and, after making other specific and pecuniary bequests, gave the residue of his personal estate to his wife, and directed his trustees and executors to receive the rents of all his property, and to apply the same in payment of his debts, together with the principal money and interest owing upon the mortgage of his property, and of the legacies and annuities given by his will, until the whole should be fully paid: it was held by Lord Cranworth, C., that the bequest of the incumbered leaseholds was not a bequest of the equity of redemption only; that the relative values [*672] of all the leaseholds should be ascertained; and that the plaintiff was not entitled to be let into possession before she had contributed her rateable proportion in discharge of all the debts and legacies: *Harper v. Munday*, 7 De G. Mac. & G. 369.

In what order assets are applicable in the exoneration of mortgaged Estates.—Where a devisee is entitled to have the estate exonerated from the mortgage debt by the assets of the testator, they will be applicable in the following order:—1st. The general personal estate: *Philips v. Philips*, 2 Bro. C. C. 273. 2nd. Lands expressly devised for payment of debts: *Serle v. St. Eloy*, 2 P. Wms. 386; *Phillips v. Parry*, 22 Beav. 279. And a proviso inserted in a mortgage of a lunatic's estate (with respect to which he afterwards died intestate), making such estate as between his heirs and devisees primarily liable to the mortgage debt previous to his lunacy secured by the deposit of the title deeds

only, has been held not to be intended to shift the primary liability from other real estates which the lunatic had, when sane, devised upon trusts for payment of his debts. See *Freeman v. Ellis*, 1 Hem. & Mill. 758, there a testator devised his personalty and an estate, K., and other real estates, upon trusts for payment of debts, and subject thereto, to certain devisees, and afterwards purchased the H. estate, as to which he died intestate. The testator deposited the deeds of the H. estate to secure 1000*l.*, and was subsequently found lunatic. Under an order in lunacy a mortgage was made of the H. and K. estates, to raise a sum of money to pay off the 1000*l.*, and the other debts of the lunatic; and a proviso was inserted, that as between the lunatic, his heirs and devisees, the H. estate should be considered as the primary security for the mortgage debt. The lunatic having died, it was held by Sir W. Page Wood, V. C., that, on the true construction of the proviso, it did not have the effect of exonerating the devised estates at the expense of the H. estate, and the devised estates were ordered to be first applied in payment of the mortgage debt. 3rd. Lands descended to the heir: *Galton v. Hancock*, 2 Atk. 424, 427, 430; *Lomax v. Lomax*, 12 Beav. 285. And 4th. Lands devised charged with debts: *Davies v. Topp*, 2 Bro. C. C. 259: and in this last case all the devisees (including the devisee of the mortgaged estate, *if so charged*) must contribute pro rata towards payment of the mortgage debt: *Carter v. Barnadiston*, 1 P. Wms. 505; *Middleton v. Middleton*, 15 Beav. 450. Secus, if other devised estates are not charged with debts; *Galton v. Hancock*, 2 Atk. 482; *Emuss v. Smith*, 2 De G. & Sm. *722. Nor is the devisee entitled to have his estate exonerated out of estate comprised in a residuary devise, which is now held, notwithstanding 1 Vict. c. 26, s. 24, to be specific. See *Eddels v. Johnson*, 1 Giff. 22; *Pearmain v. Twiss*, 2 Giff. 130; *Emuss v. Smith*, 2 De G. & Sm. 722; *Clark v. Clark*, 34 L. J. N. C. (Ch.) 477; overruling *Dady v. Hartridge*, 1 Dr. & Sm. 236; *Barnwell v. Iremonger*, Ib. 242; *Rotheram v. Rotheram*, 26 Beav. 465; *Rodhouse v. Mold*, 35 L. J. Ch. 67. And see *Hensman v. Fryer*, 3 L. R. Ch. App. 420, where Lord Chelmsford, reversing the decision of Sir R. Kindersley, V. C., decided that a residuary devise was specific, but by mistake made the specific devisee contribute rateably to pay debts with pecuniary legatees. See *Collins v. Lewis*, 8 L. R. Eq. 708. Nor is the devisee entitled to have the estate exonerated out of the personalty, as against specific legatees (*O'Neal v. Mead*, 1 P. Wms. 693; *Emuss v. Smith*, 2 De G. & Sm. 737, 738);—nor as against pecuniary legatees (*Lutkins v. Leigh*, Ca. t. Talb. 53; *Johnson v. Child*, 4 Hare, 87);—nor as against a widow's paraphernalia (1 P. Wms. 730);—nor, a fortiori, as against creditors. See *Hamilton v. Worley*, 2 Ves. jun., 65, where Lord Loughborough observes, “The equity the Court affords to a person entitled to real estate by devise, to have the incumbrances upon it discharged as a debt out of the personal estate, can go no farther than

this:—as between the heir or devisee of the estate and residuary legatee, it cannot interfere with the disposition of other parts, as specific or general legacies, much less with the interests of creditors.”

The *heir*, where an estate descends subject to a mortgage, is entitled to exoneration, in cases not within the Act 17 & 18 Vict. c. 113, as amended by 30 & 31 Vict. c. 69, first, out of the general personal estate; and, lastly, out of real estates expressly devised for payment of debts: *Hill v. Bishop of London*, 1 Atk. 621.

The election of the mortgagee to come upon the personalty for payment of the mortgage debt will not determine what fund shall be ultimately charged with it; for, under the ordinary rule of marshalling the simple contract creditors, the widow or legatees would have a right to stand in his place for so much of the real estate as he should take out of the personal. They will not, therefore, be prejudiced, nor will the devisees be benefited by the election of the mortgagee to proceed, as he undoubtedly may, against the personal estate in the first instance.

It is a well settled principle, in this country, that, in the administration of assets, the personal estate is the natural and primary fund for the payment of debts and legacies, and, as a general rule, must first be exhausted, before the real estate can be made liable; and it will not be exonerated by a charge on the real estate, unless there be express words, or a plain intent, in the will, to make such exoneration; *Lupton v. Lupton*, 2 Johnson's Chancery, 614, 628; *Livingston v. Newkirk*, 3 Id. 312, 319; *M'Kay v. Green*, Ib. 56; *Rogers v. Rogers*, 1 Paige, 188, 190; *Morris v. Mowatt*, 2 Id. 587, 591; *Mollan v. Griffith*, 3 Id. 402, 404; *Hancock v. Minot*, 8 Pickering, 29, 37; *Ruston et al. v. Ruston*, 3 Yeates, 54, 63, 65; *Todd v. Todd's Executors*, 1 Sergeant & Rawle, 453, 457, 458; *Martin and another v. Fry*, 17 Id. 426, 429; *Miller v. Harwell and Johnson*, 3 Murphy, 195, 201; *M'Loud v.*

Roberts et al., 4 Hening & Munford, 443; *Foster and Wife, and others, v. Crenshaw's Executors*, 3 Munford, 514; *Waring v. Waring*, 2 Bland, 673, 675; *Wyse et al. v. Smith and Buchanan*, 4 Gill & Johnson, 296, 302; *Chase v. Lockerman*, 11 Id. 186, 203; *Marsh's Heirs v. Marsh's Devisees*, 10 B. Monroe, 360; *Alexander v. Waller*, 6 Bush. 330; *Clark v. Henshaw*, 30 Indiana, 144. See *post*, vol. 2, note to *Aldrich v. Cooper*. If both the personal and real estate are expressly charged with the payment of debts, they do not become liable, equally, but the personalty must first be exhausted, before the land can be sold; *Hoye v. Brewer and Troup*, 3 Id. 153, 157; *Leavitt v. Wooster*, 14 New Hampshire, 551, 564; *Sims v. Sims*, 2 Stockton's Chancery, 158; *Clinefelter v. Ayers*, 16 Illinois, 329. See *Hays et al. Executors v. Jackson et al.*, 6 Massachusetts, 149, 151; *M'Campbell v. M'Campbell*, 5 Monroe, 92,

102. And the same rule holds good with reference to a charge of legacies; *Sims v. Sims*, 2 Stockton's Ch. 158; *Canfield v. Bostwick*, 21 Conn. 550. But when real and personal property are blended together in one fund, and charged with a common burden, the right of the realty to exoneration, at the expense of the personalty, will cease, and each will be compelled to contribute equally; *Elliott v. Carter*, 9 Grattan, 541, 553.

Though a mere charge upon lands will not render them the primary fund, yet lands descended, or devised to be sold, or devised on condition that the devisee shall pay the testator's debts, will be liable in preference to personalty specifically bequeathed. But this result will not follow from a direction that the land shall be sold for the purpose of paying legacies, or of distributing the proceeds among persons designated by the testator, nor unless the object of the sale be to provide a fund for the payment of debts; *Martin v. Fry*, 17 S. & R. 426.

Lands descended are certainly liable before specific bequests of personalty; *The Commonwealth v. Shelby*, 13 Sergeant & Rawle, 348; *Warley v. Warley*, 1 Bailey's Equity, 398.

In *Robards v. Wortham*, 2 Devereux's Equity, 173, where this point was decided, the general principle as to the kind of appropriation of land for the payment of debts, which will render such land primarily liable, was very clearly stated. "If lands be de-

vised to be sold for the express purpose of paying debts," said Ruffin, J., in delivering judgment, "and the surplus given away as money, there can be no doubt they are first liable, even as between them and a residuary legatee, unless some express interest is given to another in the land fund. For the residue is not given there in its general sense, after payment of debts; but it means the residue of the personal property after taking out such parts as are before given away. But where lands are merely charged, a question arises, are they to pay before or after the personalty? And the general rule is, that unless the contrary clearly—formally, expressly—appear, the personal estate is to be first exhausted, and the real is only auxiliary; the charge being considered as an act of honesty in the testator, to have his debts of all sorts certainly and speedily paid; and not to change the fund in the first instance, to which resort is to be had. The law fixes the burden on the personalty, and that can only be altered by the testator. And the intention on his part to alter it, is not inferred upon slight grounds. Charging the land is not sufficient. However anxiously it is done, that will not of itself, have the effect of exempting the personalty, says Lord Rosslyn, in *Taitt v. Northwick*. And Lord Thurlow says, in *Samwell v. Wake*, (1 Bro. C. 144,) and at several other times, that the testator must not only charge the real estate, but must show his purpose that the personal should not be applied, be-

fore the latter will be exempted. Many minute criticisms on wills have been made, to ascertain the intention in this respect. The final result of the discussions has been, that unless the personalty, although specifically bequeathed, be expressly or clearly exonerated by other parts of the will, a charge upon the lands will not have that effect. The reason is, that after one fund becomes fixed with the debts, or a particular debt, that fund can be relieved only by plain words postponing its liability, and substituting another fund in its place. A *general* charge will not do; because that may *as well* be considered the creation of an additional fund, in aid of that already liable, as the provision of a sole fund for the payment of debts. But it is entirely different, where the personalty is specifically bequeathed, and the lands *descend*. So essentially different are the cases, that I should not have felt bound to notice at large those cases, of a *charge*, but for the purpose of exhibiting clearly their leading principle.

"That principle is, that the order of liability once existing between two funds can be changed only by the intention of the testator; and to show such intent, express or plain words are indispensable, so as to make the intent manifest.

"Where lands descend, they, as well as the personalty, constitute a primary fund for the satisfaction of specialty debts and specific liens. And the testator, by giving away the personalty by specific

bequests, is held to show his intention, that the land shall bear its own burden unassisted. Hence that may be called the order, in which by law those funds, thus situated, are to pay. That order will not be disturbed, but upon a plain intent, as if the land be devised to the heir. He takes indeed as heir, because the better title. Yet as denoting the intent, he shall for this purpose be considered as a devisee; who always holds exempt from debts, until *all* the personalty is exhausted, unless the devise be for the payment of debts, or there be a *charge* in terms which placed the land in front of the personalty. No doubt the whole is under the testator's control; and he may even effectually declare, that lands descended shall be eased by his general personal residue, or even his particular legacies. But it will be admitted by every one, after considering the before mentioned cases, and the principle on which they are founded, that to do that, the words must be indeed strong." In the subsequent case of *Palmer v. Armstrong*, 1b. 268, these views were again affirmed, and it was declared that the mere circumstance of charging land with the payment of debts did not render it primarily liable.

In like manner a specific bequest of all the personalty, and a devise of land under the condition that the devisee pay all the testator's debts, will render the land the primary fund, to the exemption of the personalty, even if the devisee refuses the land upon those terms;

because the intent of the testator is sufficiently manifested; *M'Fait's Appeal*, 8 Barr, 290. "In order to exonerate personal estate from the payment of debts," said the court, "there must be either express words or a plain intention, as it is the primary fund. But the intention may be found, not only in the mode in which the personal estate is given, but also in the manner of the devise of the real estate. The real estate may be so appropriated to the payment of debts and legacies, as to show a clear intention that they shall not be a burden on any other fund, although the personal estate is not expressly exempted." The opinion of the judge, perhaps, was, that the mere form of the devise was enough to exonerate the personalty, even if the latter had not been specially bequeathed; but the case is not an authority for such a position.

But if the personalty be bequeathed generally and not specifically, it will not be exempted in preference to descended land, unless an intention to that effect be disclosed in the will; *Verdier v. Verdier*, 12 Richardson's Eq. 138. In the *Case of Walker's Estate*, 3 Rawle, 229, there was a bequest to the testator's widow of "all his household goods and furniture, moneys, bonds, mortgages, outstanding debts due and owing to him, and all his other personal estate of what nature or kind soever;" but it was decided that this personal property was liable to debts in preference to after-acquired lands. "In order to exonerate this personal fund," said the

court, "the will must contain express words for that purpose, a clear, manifest intention, a plain declaration, or a necessary inference, tantamount to express words. The question, in each particular case of exemption, resolves itself into this: Does there appear from the whole testamentary disposition, taken together, an intention on the part of the testator, so expressed, as to convince a judicial mind, that it was meant not merely to charge the real estate, but so to charge it as to exempt the personal? For it is not by an intention to charge the real, but by an intention to discharge the personal estate, that the question is to be decided."

The rule in regard to the primary liability of personal estate, is to a considerable extent, the same in regard to legacies as to debts; *Sims v. Sims*, 2 Stockton's Ch. 158; but the New York cases recognize a distinction as to exoneration by an express bequest of the whole personalty. "I agree with the present Lord Chancellor of Ireland," said the chancellor, in *Hoes v. Van Hoesen*, 1 Barbour's Chancery, 380, 400, "that the soundest and most sensible rule of construction, both as to debts and legacies, would have been, that if there are express words of dedication of a portion of the real estate for the payment of debts or legacies, and the testator has disposed of all his personal estate specifically, the fund which the testator has himself provided for the purpose should be deemed the primary fund. The current of authorities, however, is certainly the other

way, so far as relates to the payment of debts, at least. It is also the general rule that the personal estate is the primary fund for the payment of legacies, although such legacies are charged upon the real estate; whether such real estate be devised with a direction to the trustee to pay the legacies, or is charged with such legacies, or given to trustees for that purpose. But in reference to legacies, an absolute disposition of all the personal estate of the testator, and not a mere residuary bequest, is sufficient to manifest the intent of the testator to charge the realty in exoneration of the personalty. Thus in the case of *Kelsey v. Deyo*, (3 Cow. Rep. 133,) where the testator bequeathed his whole personal estate, after payment of debts, to his wife for life, with remainder to all his children at her death, and then devised all his real estate to his son N. in fee, subject to certain privileges therein, in favor of the widow; and directed him to pay certain legacies, one-half thereof in two years after the testator's death and the other half in two years after the death of the widow; and made the devisee and other persons executors; the Supreme Court held that it was manifest from the will that he meant to exonerate the personal estate. But in the subsequent case of *Tole v. Hardy*, (6 Cow. Rep. 333,) where the testator directed that his widow should be maintained out of his estate, and that she should have all his furniture, &c., and then devised his real estate to his son in fee, and directed him to pay cer-

tain legacies, and appointed the widow executrix, and the devisee the executor of the will; and the same court held that the personal estate, not specifically bequeathed, was not exonerated, and was the primary fund for the payment of the legacies; although the devisee was also charged with the payment, in respect to the land devised to him. And I have not been able to find any case, where the personal estate was not in terms exonerated, or the legacies declared to be chargeable upon the real estate exclusively, in which an interest in personal property not disposed of by the will was held to be exonerated. On the contrary, it appears to be settled, that where the personal estate is in terms exonerated, for the benefit of a particular legatee, and not for the benefit of such estate generally, the failure of the particular bequest destroys the exoneration *pro tanto*." "The mere making of a provision for the payment of debts or legacies out of the real estate," said Jewett, Ch. J., in the same case in the Court of Appeals, where the decree of the chancellor was affirmed, "does not discharge the personalty. There must be an intention not only to charge the realty, but to *exonerate* the personalty; not merely to supply another fund, but to substitute that fund for the property antecedently liable. Thus, in numerous cases, it has been held that neither a charge of debts on the testator's lands *generally*, or on a specific portion of them, nor a devise upon trust for sale, however formally or anxiously framed, nor

the creation of a term of years for the purpose of such charge, will *exonerate* the personalty. Nor is it material that the charge is imposed on the devisee in the terms of a condition, as where real estate is devised to A., he paying the debts and legacies, or the like. In all these cases, the charge upon the realty, or the condition that the devisee shall pay as directed, is deemed and taken to have been made in *aid* of the primary fund, and not in *exoneration* of it, unless there is an *absolute* disposition of all the personal estate of the testator; in such case, the intent of the testator to charge the realty in exoneration of the personalty, is sufficiently manifested;” *Hoes and others v. Van Hoesen*, 1 Comstock, 120, 123. See *post*, vol. 2, notes to *Aldrich v. Cooper*.

It is well settled, that if a person borrows money, and gives his bond and mortgage for the debt, the mortgage is merely a collateral security for the personal obligation, and the heir or devisee may call upon the executor to exonerate the land, by an application of the personal assets to the discharge of the mortgage: see *Case of Keyzey, Jr.*, 9 Sergeant & Rawle, 71, 73; *Cumberland v. Codrington*, 3 Johnson’s Chancery, 229, 257; *Ruston et al. v. Ruston*, 2 Yeates, 54; *Hewes v. Dehon*, 3 Gray, 205; *Mansel’s Estate*, 1 Parson’s Equity, 367; *Goodburn v. Stevens*, 1 Maryland, Chancery, 420; *Plumpton v. Plumpton*, 11 Allen, 139; *post*, vol. 2, notes to *Aldrich v. Cooper*. This, however, is now altered in New York, by the Revised Stat-

utes, which enact that “whenever any real estate, subject to a mortgage executed by an ancestor or testator, shall descend to an heir, or pass to a devisee, such heir or devisee shall satisfy and discharge such mortgage, out of his own property, without resorting to the executor or administrator of his ancestor, unless there be an express direction in the will of such testator, that such mortgage be otherwise paid.” 1 R. S. p. 749, s. 4; see *Mollan v. Griffith*, 3 Paige, 402, 404; *House v. House*, 10 Id. 159, 164.

But the distinction between mortgage debts originally contracted by the testator, and those contracted by another, is also established in the American cases; and it is agreed, that in the latter case, the land is considered as the debtor, and shall bear its own burden. If A. purchases an estate subject to a mortgage, and dies, his personal estate shall not be applied to the exoneration of the land, unless he has done some act by which he has created a new and original liability in himself; *Case of Keyzey, Jr.*, 9 Sergeant & Rawle, 71, 73. The nature of the act or promise by which the purchaser of lands subject to an incumbrance, makes his personal assets liable, was very thoroughly discussed with an examination of all the cases, by Chancellor Kent, in *Cumberland v. Codrington*, 2 Johnson’s Chancery, 229, 257, 272. “The question,” says the chancellor, in that case, “seems to be, not merely whether the purchaser has rendered himself liable at law to a

suit by the creditor, but which estate is to be deemed the primary fund, and which only the auxiliary. When a man gives a bond and mortgage for a debt of his own contracting, the mortgage is understood to be merely a collateral security for the personal obligation. But when a man purchases, or has devised to him, land with an incumbrance on it, he becomes a debtor only in respect to the land; and if he promises to pay it, it is a promise rather on account of the land, which continues, notwithstanding, in many cases, to be the primary fund. The same equity which in other cases makes the personal estate contribute to ease the land, as between the real and personal representatives, will here make the land relieve the personal estate. There is good sense and justice in the principle; and I feel the force of the doctrine, that it requires very strong and decided proof of intention, before the court can undertake to shift the natural course and order of obligations between the two estates.

"Lord Thurlow, in *Ancaster v. Mayer*, seemed inclined to think, that in *Evelyn v. Evelyn*, the son by his covenant had made the debt his own, and he supposed the idea of the court must have been, that the covenant was by way of accommodating the charge, and not of making the charge his own. But there are so many cases, and even some decided by Lord Thurlow, in which a mere bond or covenant to the mortgagee will not, of itself, and without other circumstances, shift the charge, that I see no

ground for surprise at this commanding decision.

"The result of the cases seems to be, that as to wills, the testator may, by express directions, charge such an incumbrance upon his personal assets, or even without express words, he may do it by dispositions and language that are tantamount; as if, for instance, the continuance of the charge primarily on the land would be repugnant to some of the provisions in the will and defeat them. As to other acts of the purchaser in his lifetime, in order to charge his personal estate as the primary fund, he must make himself, by contract, personally and directly liable at law for the debt to the owner of the incumbrance; and even a covenant or bond for the purpose will not be sufficient unless accompanied with circumstances showing a decided *intention* to make thereby the debt personally his own."

Where premises are sold, subject to a mortgage, as part of the consideration-money, the grantee, as between himself and the grantor, is bound to pay, and is liable to an action on the part of the grantor for breach of contract in not paying; *Campbell v. Shrum*, 3 Watts, 60; *Trevor v. Perkins*, 5 Wharton, 244, 253; *Young v. Stone*, 4 Watts & Sergeant, 45; *Blank v. German*, 5 Id. 36; *Dubbs v. Finley*, 2 Barr, 397; (see *Walker v. Physick*, 5 Id. 193;) and in equity the grantee is, as between himself and the grantor, considered as the principal debtor, and the grantor as his surety entitled upon payment, to all the

privileges of that character; *Marsh v. Pike*, 10 Paige, 595; *Cornell v. Prescott*, 2 Barbour, S. C. 17, 18; but the grantee does not become personally liable to the mortgagee without some promise or engagement made to him; *Dorr v. Peters*, 3 Edwards, 132, 133; *Kearney v. Tanner*, 17 Sergeant & Rawle, 94, 97; *Daniel v. Leitch*, 13 Grattan, 195. "There is a distinction to be noticed running through the great mass of cases cited by Chancellor Kent, in *Cumberland v. Codrington*," said the Vice-Chancellor in *King v. Whitely and others*, Hoffman, 477: "one class of the cases is where the assumption of the debt is undeniable, but it still remains to decide whether the land must first be resorted to. The other class is, where the question arises whether any assumption has been made. Chancellor Kent states that the cases all agree that no covenant with the mortgagor is sufficient to make the debt a personal one of the purchaser. There must be a direct communication and contract with the mortgagee."

There are, therefore, three distinct classes of cases, in regard to the liability of the purchaser of mortgaged premises. 1. Where he becomes personally liable to his vendor for the payment of the mortgage money, though liable to the mortgagee only in respect of the land. 2. Where he makes himself personally liable to the mortgagee, yet so that after his death his general personal estate is liable only as surety for the land, and therefore secondarily. 3. Where he substitutes his

personal obligation as the primary debt, the land being liable only upon the failure of his personal assets. See *Hoff's Appeal*, 12 Harris, 200; *Thompson v. Thompson*, 4 Ohio, N. S. 333; *Post*, vol. 2, notes to *Aldrich v. Cooper*; *Gould v. Winthrop*, 5 Rhode Island, 319.

[The result will be the same whether the title to the land is acquired by operation of law or by grant; and whether it has its origin in a gift or a purchase; the rule being that an obligation incurred by the former owner, shall not be regarded as the debt of his successor, nor thrown, in the first instance, upon the personal assets of the latter, unless he has manifested an intention to make it primarily his own, and not merely as a means of securing his hold on the land. *In re Taylor*, 8 Exchequer, 384; *Cumberland v. Codrington*, 3 Johnson's Ch. 229. Thus where land which had been mortgaged by A. and devised by him to B., was subsequently devised by B. to C., who was named as executor in the will, C. was held to have no right or authority to apply the assets of B. to the payment of the mortgage, because that would have been to take the property of one man to pay the debt of another; B. being as much a stranger to the obligation of A. as if he held no interest in the premises which had been mortgaged as a security for its fulfilment; *In re Taylor*. Indeed, the presumption against the application of the personality, would seem to be stronger when the land descends or is given, than when it is purchased; because, one

who buys subject to a mortgage, with a proportionate abatement from the consideration for the sale, may be presumed to intend, and is indeed bound to satisfy the mortgage, as the means and for the purpose of completing the purchase, and rendering that which he has bought absolutely his own; which cannot be said of an heir or devisee who takes by operation of law, or the bounty of the testator. Hence, the better opinion would seem to be, that a covenant for the payment of incumbrances, created by a deviser or ancestor, through or by whom the land has descended or been given to the covenantor, will be presumed to have been executed for the benefit of the land, and not for the purpose of charging the personalty. This view was taken by the Supreme Court of the United States, in *M'Learn v. M'Lellan*, 10 Peters, 623 644, and a judgment against Archibald M'Learn for the purchase-money of a tract of land bought by him and subsequently devised by his son, James M'Learn, said to be a debt of the father and not of the son, although he had given a bond and mortgage as additional or collateral security for the judgment after the death of his father, in the hope of obtaining time for the payment of the judgment, and thus protecting the estate which he held under the devise. The case of *Cumberland v. Codrington*, 3 Johnson's Ch. 252, said M'Lean, J., who delivered the opinion of the court, shows that "as between the representatives of the real and personal estate,

the land is the primary fund to pay off a mortgage. And in 2 Bro. 57, Lord Kenyon, as Master of the Rolls, laid down the same rule; that where an estate descends, or comes to one subject to a mortgage; although the mortgage be afterwards assigned, and the party enter into a covenant to pay the money borrowed; yet that shall not bind his personal estate.

"There is no doctrine better established than that the purchase of land, subject to a mortgage debt, does not make the debt personal; and on the question being raised, such debt has been uniformly charged on the land. And this principle is not changed where additional security has been given.

"In the case of *Evelyn v. Evelyn*, 2 P. Wms. 659; A. mortgaged the land for 1500 pounds; and his son B. covenanted with the assignee of the mortgage to pay the money. He succeeded to the premises after the death of his father, and died intestate. The question was, whether his personal estate, under the covenant, should be applied in payment of the mortgage; and it was decided that the land should be charged, and the covenant was only considered as additional security.

"In the case of *Waring v. Ward*, 7 Ves. 334, Lord Eldon says: "The principle upon which the personal estate is first liable in general cases is, that the contract primarily is a personal contract; the personal estate receiving the benefit: and, being primarily a personal contract, the land is bound only in aid of the personal

obligation to fulfil that personal contract.' It has long been settled, therefore, that upon a loan of money, the party meaning to mortgage, in aid of the bond, covenant, or simple contract debt, if there is neither bond nor covenant; his personal estate, if he dies, must pay the debt for the benefit of the heir. But suppose a second descent cast; and the question arises, the personal estate of the son, and his real estate, descended to the grandson: then the personal estate of the son shall not pay it, as it never was the personal contract of the son.

"And this is the well established rule on this subject. If the contract be personal, although a mortgage be given, the mortgage is considered in aid of the personal contract; and, on the decease of the mortgagor, his personal estate will be considered the primary fund, because the contract was personal: but if the estate descend to the grandson of the mortgagor, then the charge would be upon the land, as the debt was not the personal debt of the immediate ancestor.

"And so, if the contract was in regard to the realty, the debt is a charge on the land. It is in this way that a court of chancery, by looking at the origin of the debt, is enabled to fix the rule between distributees.

"In the case under consideration, the mortgage was given by James H. M'Learn, but it was not given to secure a debt created by him. The mortgage merely changed the security, but did not affect the

extent of the judgment lien. And this judgment was obtained, chiefly, for the purchase-money of the estate. In effect, the debt for which the judgment was obtained against Archibald M'Learn, and for which the mortgage was given, constituted an equitable lien on the land; and had the mortgage covered only the land, it must have been considered the primary fund. The debt for which the mortgage was given, was not the personal contract of James H. M'Learn, but the contract of his ancestor in the purchase of the estate. But if the contract was personal, and might have been a charge on the personal estate devised to James H. M'Learn, yet the character of the debt, in this respect, is changed in the hands of the present heirs. In the language of Lord Eldon, this debt cannot be a charge on the personalty, because it was not created by the personal contract of James H. M'Learn." But the court went on to determine that, as the mortgage given by James M'Learn embraced the personalty which had descended to him from his father, Archibald M'Learn, as well as the land, it was a charge on both, and both should, therefore, be applied equally to the payment of the debt of the father.

The weight of authority, therefore, seems to be, that the personal estate is not primarily liable, unless the testator has not merely made himself answerable for the payment of the mortgage, but has made the debt directly and absolutely his own, or has, in some other way, manifested an intention

to throw the burden on the personalty in case of the land; *Keyser's Estate*, 9 S. & R. 371; 1 Parson's Eq. 379; *Halsey v. Reid*, 9 Paige, 173; *M'Learn v. M'Lellan*, 10 Peters, 625, 644; *In re Taylor*, 8 Exchequer, 384.

A different view was, notwithstanding, taken in *Hoff's Appeal*, 12 Harris, 200, and a recital in a receipt for the purchase-money of land, subject to a mortgage, that the mortgage formed part of the consideration, and was to be paid by the vendee, held to be an assumption of the debt which rendered it primarily payable out of the personalty. The court were of opinion that the mortgage was, in equity, if not at law, the debt of the purchaser, and that it should consequently be paid out of the personal property and not out of the land. It may be conceded that the vendor was entitled to exoneration at the expense of the land, and that the vendee was bound to come in aid of the land if insufficient; but the doubt would seem to be whether this obligation was not, in some measure, secondary, and whether it rendered the personal estate primarily liable; see *Mitchell v. Mitchell*, 3 Maryland Chancery, 71. *Hoff's Appeal* is, however, sustained by the recent case of *Thompson v. Thompson*, 4 Ohio, N. S. 333; and the purchase of an estate subject to a mortgage, which was deducted from the consideration, followed by the payment of interest to the mortgagee, held to convert the mortgage into the debt of the purchaser, and make it primarily payable out of the per-

sonalty, in case of a devisee of the land.

The rule which makes the personal property of the mortgagor the primary fund for the payment of a mortgage, only applies as between heirs or devisees on the one side, and distributees or residuary legatees on the other, and has no application to any portion of the personalty which has been made the subject of a pecuniary or specific bequest; *Mason's Estate*, 1 Parson's Eq. 129; *Hoff's Appeal*, 12 Harris, 200; *Mallan v. Griffith*, 3 Paige, 402; and this course will be pursued even when the land is devised to one child, and the personalty to another; *Mason's Estate*. See *Howes v. Dehon*, 3 Gray, 205, and *Plumpton v. Fuller*, 11 Allen, 139, where this distinction appears to have been disregarded.]

When assets are marshalled by a court of equity, for the payment of debts, they take the following order: 1. The general personal estate, viz., the personal estate not specifically bequeathed; 2. Real estate specially and particularly devised to be sold for the purpose of paying debts; 3. Real estate descended, whether owned by the testator at the making of the will, or acquired afterwards; 4. Real estate specifically devised, and charged generally with the payment of debts: this is the general course, and every departure from it may be regarded as an exception to a general rule; *Livingston v. Newkirk*, 3 Johnson's Chancery, 312, 319; *Hays et al. v. Jackson et al.*, 6 Massachusetts, 149, 151; *M'Campbell v. M'Campbell*, 5 Monroe, 92,

102; *The Commonwealth v. Shelby*, 13 Sergeant & Rawle, 348, 355; *Case of Walker's Estate*, 3 Rawle, 229, 239. See *Alexander v. Walker*, 6 Barb. 330. When debts remain, after the personal estate and the descended real estate are exhausted, they are shared in rateable proportions by all the devisees, according to the *quantum* and value of their respective interest; *Livingston v. Livingston*, 3 Johnson's Chancery, 148, 158, 159. Lands descended will be marshalled in favor, or for the relief, of specific legatees; *Livingston v. Livingston*, Ib. 148, 153; but the priority between specific devisees and specific legatees does not appear to be satisfactorily settled either here or in England. In *Livingston v. Livingston*, Chancellor Kent said that equity would not, in favor of specific legatees, interfere with lands devised unless they were devised subject to the payment of debts. "The personal property," said another chancellor in *Rogers v. Rogers*, "is the primary fund for the payment of the debts of the testator; and as a general principle, must be exhausted before the lands can be resorted to for that purpose. . . . Where there is a specific lien on the land devised, as in the case of a mortgage, or where the land is devised on condition of the payment of debts, or the debts are directed to be paid out of the estate devised, or where it appears from the will that it was obviously the intention of the testator that the legacy should be received entire, and the debts paid out of other funds, the court

will marshal the property in such manner as to carry that intention into effect. . . . If the testator specifically bequeaths his chattels to one person, and devises his real estate to another, without any direction as to which property shall be appropriated to satisfy an existing judgment against him, the personal property must be first applied to that object;" *Rogers v. Rogers*, 1 Paige, 188, 190. See, also, *Miller v. Harwell and Johnson*, 3 Murphy, 195; and *Cryder's Appeal*, 1 Jones, 72. In Maryland, in *Chase v. Lockerman*, 11 Gill & Johnson, 186, 204, however, it was determined that devisees and specific legatees should contribute rateably in respect to debts by specialty, though devisees should not contribute to legatees in the case of simple contract debts. It has also been held that a devisee of land subject to a mortgage, is entitled to have the residuary personal estate, but not specific or ascertained pecuniary legacies, applied in ease of the land; *Ruston et al. v. Ruston*, 2 Yeates, 54.

[The better opinion would seem to be, that devisees must contribute equally with specific legacies to debts which are a lien on the land in their own nature, or have been charged upon it by the will; *Hallowell's Estate*, 11 Harris, 223; *Shreve v. Shreve*, 2 Stockton Chancery, 385. An opposite opinion expressed in *Elliott v. Carter*, 9 Grattan, 545, 550, that contribution cannot be claimed, unless the charge has been imposed by the testator, being apparently founded

upon an erroneous interpretation of the language held by Lord Cottingham in *Mirehouse v. Scaife*, 2 Mylne & Craig, 695.]

In South Carolina, some deviations from the English rules have been created by the operation of local statutes. The general personalty is still the primary fund, in exoneration of the land, if no other direction be given in the will; *Stuart v. Executor of Carson*, 1 Dessaussure, 500, 513; *Hayleyburton v. Kershaw and others*, 3 Id. 105, 115; *Hall v. Hall*, 2 M'Cord's Chancery, 269, 302; but a particular property or fund, real or personal, appropriated or pointed out by the will, for the payment of debts, will be liable before any other part of the estate; *Dunlap et al. v. Dunlap et al.*, 4 Id. 305, 329; *Pell et ux. et al. v. Ball et al.*, 1 Spears' Equity, 519; *Pinckney v. Pinckney*, 2 Richardson's Eq. 219, 235, 244; *Ford v. Gaither*, Id. 270, 272. The general rule established in South Carolina is, that assets are to be administered in the following order: first, real or personal estate devised for the payment of debts, or in any manner directed to be so applied; secondly, personal estate, not specifically bequeathed; and a bequest of the testator's *whole* personal estate, or of the residue after specific legacies out of it, is in that state to be regarded as specific, for this purpose, though a bequest of the residue merely, or of the residue, "after payment of debts," would leave it liable to debts in exoneration of lands descended; thirdly, descended real

VOL. I.—59.

estate; fourthly, personal estate specifically bequeathed; and lastly, real estate devised; *Warley v. Warley*, 1 Bailey's Equity, 398, 409; *Pell et ux. et al. v. Ball et al.*, 1 Spears' Equity, 519; *Leurens v. M'Grath*, 1 Richardson's Eq. 296, 300; *Pinckney v. Pinckney*; *Ford v. Gaither*.

[In *Parke v. Fearnley*, 2 Simon & Stuart, Sir John Leach said, that in the determination of such questions the court would not take the amount of the personal estate into consideration, and must be governed solely by the terms of the will; *ante*; and similar language was held in New York; *Lupton v. Lupton*, Johnson Ch.; *Rafferty v. Clark*, 1 Bradford, 475. It is agreed on all hands that the declarations of the testator cannot be used to vary, control, or aid the interpretation of the instrument. But the better opinion seems to be, that in ascertaining the meaning of written as of spoken language, all the circumstances may be taken into view that can elucidate the subject matter, and show of what it consists. In reading a will, we should stand, as far as may be, in the position of the testator, and be acquainted with every material fact that was known to him. It is therefore proper to consider what he had to give, and how far he was bound by the ties of duty or affection to those whom he designated as the recipients of his bounty; *Laurens v. Read*, 14 Richardson's Eq. 245, 2 *Redfield on Wills*, 514; *Williams v. Bradley*, 3 Allen, 270, 280.

In *Van Winkle v. Van Houten*,

2 Green, Ch. 172, it was declared to be well settled in New Jersey, contrary to the inclination of the English authorities, that regard should be had to the nature and amount of the property bequeathed in determining whether debts and legacies had been charged on the land; and the same ground was taken in *Day v. Day*, 4 C. E. Green, 137, and *Laurens v. Read*, 14 Richardson, 245. In *Leigh v. Savidge*, 1 M'Carter, 124, it was held to be a material circumstance that the personal estate was inadequate, and that the testator was an alien whose real estate would escheat, if not appropriated to the payment of the legacies.

If such evidence is received, it should be in strict subordination to the maxim, *Quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est*. See *Hannum v. West Chester*, 20 P. F. Smith; *Russell v. Kennedy*, 16 Id. 248; *The Commonwealth v. Wickersham*, Ib. 134. The rule was accurately stated in *Hannum v. Fryer*, 3 L. R. Ch. 424, where Lord Chelmsford said: "I do not feel myself at liberty to regard the insufficiency of the personal estate to pay the testator's debts as a ground for implying an intention that the £2000 legacy should be a charge on the real estate. Where the meaning of a will is doubtful,

the Court may assist its construction by evidence of the state of the testator's property at the time when it was made; but where the words are plain, no such extrinsic aid can be resorted to, to give them a different meaning."

In *Toole v. Swasey*, the court took a similar view of the cognate question whether circumstances not appearing in the will can be regarded in determining the priority of a legatee. "Where there is nothing in the language of the will indicating that a particular legacy is to have a preference in the event of a deficiency of assets, extrinsic evidence is not admissible for the purpose of establishing the existence of such an intention. The will is to be interpreted by what the testator has written rather than by what he ought to have written. The circumstances of mere relationship and dependence, though not of themselves sufficing, must notwithstanding be regarded as constituting, in the language of the Lord Chancellor in *Miller v. Huddleston*, 3 Macnaughton & G. 513, 528, an auxiliary reason for allowing such priority when the words used in the will favor the notion of priority in a sufficient degree. This is the doctrine of the leading case of *Lewin v. Lewin*, 2 Ves., Sen. 415; "*Towle v. Swasey*, 106 Mass. 100.]

RUSSEL v. RUSSEL.¹

[*674]

EASTER TERM, 1788.

REPORTED 1 BRO. C. C. 289.²

EQUITABLE MORTGAGE BY DEPOSIT OF TITLE-DEEDS.]—*Pledge of a lease carried into effect, against assignees of a bankrupt. Evidence of the bankrupt, he having had his allowance, and certificate allowed to be read.*

A LEASE having been pledged by a person (who afterwards became a bankrupt) to the plaintiff, as a security for a sum of money lent to the bankrupt, the pledgee brought this bill for a sale of the leasehold estate.

Mr. *Lloyd*, for the plaintiff, merely stated the case, and that the plaintiff had a lien upon the estate.

Mr. *Kenyon*, for the defendants, the assignees, insisted that the plaintiff's claim was against the law of the land; for that it would be charging land without writing, which is against the fourth clause of the Statute of Frauds.³

Lord *Loathborough*, Lord Commissioner.—In this case it is a delivery of the title to the plaintiff for a valuable consideration. The Court has nothing to do but to supply the legal formalities. In all these cases the contract is not *to be* performed, but *is* executed.

ASHURST, Lord Commissioner.—Where the contract is for a sale, and it is admitted so to be, it is an equivocal act to be explained, whether the party was admitted as tenant or as purchaser. So here it is open to explanation, upon what terms the lease was delivered.

A question arose as to reading the bankrupt's evidence *he having had his allowance and certificate, but the Court suffered it to be read, thinking him not bound to [*675] refund.

An issue was directed to try whether the lease was deposited as a security for the sum advanced by the plaintiff to the bankrupt.

Upon the trial, the jury found it was deposited as a security.⁴

¹ *Hales v. Van Berchem*, 2 Vern. 617, where it was held that the deposit in that case for the performance of a written agreement, though there was no writing declaring it to be a security, was not within the statute.

² Reg. Lib 1782, A., fol. 441.

³ 29 Car. 2, c. 3, s. 4.

⁴ The Reporter has been informed that this cause came on afterwards (though he has not been able to ascertain the date) before Lord Thurlow, on the equity

By the 4th section of 29 Car. 2, c. 3, commonly called the Statute of Frauds and Perjuries, it is enacted, "that no action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

Notwithstanding this statute, it was held first by the Lords Commissioners, and afterwards by Lord Thurlow, in the case of *Russel v. Russel*, that a mere deposit of title-deeds by a debtor for the purpose of securing a sum of money, gave his creditor, in whose hands they were placed, an *interest in the land* to which they related, so as to enable him to file a bill for a sale.

"I remember," says Lord Eldon, "previously to *Russel v. Russel*, it was very much doubted, whether a mere deposit of deeds constituted an equitable mortgage, if there was no writing to manifest the purpose; since, resting altogether upon parol, it is quite competent to the man who put the deeds into the hands of a creditor, without reference to the debt, afterwards, from favour to that creditor, to say, they were deposited with him for the purpose of securing his debt; and so all the perjury that the statute meant to avoid is introduced, and the rule changed. But Lord Thurlow was of opinion, and that is not now to be disturbed, that *the fact of the adverse possession of the deeds in the person claiming the lien, and out of the other, was a fact that entitled the Court to give an interest.*" *Ex parte Coming*, 9 Ves. 115. On many other occasions, *Russel v. Russel* has been strongly commented on, and disapproved of by Lord Eldon, as in effect repealing part of the Statute of Frauds. It has, however, been constantly acted upon and recognised as a *binding authority. See *Ex parte Weth-[*676] erell*, 11 Ves. 398; *Ex parte Haigh*, 11 Ves. 403; *Ex parte Mountford*, 14 Ves. 606; *Ex parte Kensington*, 2 V. & B. 79; *Ex parte Hooper*, 1 Mer. 9; *Lacon v. Allen*, 3 Drew. 579, 582; *The National Bank of Australasia v. Cherry*, 3 L. R. P. C. C. 299.

A deposit of a copy of court rolls (*Ex parte Warner, re Cooke*, 1 Rose, 286; *Winter v. Lord Anson*, 3 Russ. 493; *Whitbread v. Jordan*, 1 Y. & C. Exch. Ca. 303; *Tylee v. Webb*, 6 Beav. 552; *Pryce v. Bury*, 2 Drew. 11), or of an agreement for a lease (*The Unity Joint-Stock Mutual Banking Association v. King*, 25 Beav. 72), will create an equitable mortgage. So likewise will a deposit of certificates of shares

reserved, when his Lordship ordered that the lease should be sold, and the plaintiff paid his money.

The same point has been since determined in the cases of *Featherstone v. Fenwick*, May, 1784, and *Harford v. Carpenter*, 17th and 18th of April, 1785, where Lord Thurlow held, that the deposit of deeds entitled the holder to have a mortgage, and to have his lien effectuated. Although there was no special agreement to assign, the deposit affords a presumption that such was the intent.

in a public company (*Ex parte Moss*, 3 De G. & Sm. 599; *Re Shelley*, 13 W. R. (L. C.) 356; Sed vide *Ex parte Boulton, re Sketchley*, 1 De G. & Jo. 163); or of a policy of insurance (*Ferris v. Mullins*, 2 Sm. & Giff. 378).

Notice, however, to the company of the deposit was necessary previous to 32 & 33 Vict. c. 71, s. 15, in order to take such property out of the order and disposition of the depositor, should he become bankrupt or insolvent: *Ex parte Boulton, re Sketchley*, 3 Jur. N. S., Ch., 425. But a deposit of a land order of the New Zealand Company, by way of mortgage, was held to be good, without notice having been given to the company of the deposit: *Ex parte Barnett*, 1 De G. 194. And a deposit of a minute of a lease of lands and a pledge of chattels in Scotland does not require registration, under the Bills of Sales Act, 17 & 18 Vict. c. 36; *Coote v. Jecks*, 13 L. R. Eq. 601.

Previously to the decision of *Russel v. Russel*, many cases occurred in which persons having title-deeds in their hands had a right to say they had an interest in the deeds, but not in the estate, except collaterally; if, for instance, the owner could not part with the estate without the deeds, he should not have them without paying the debt, the possession of the deeds giving no direct interest in the estate, but an interest arising out of the power of embarrassing the proprietor in the sale: *Ex parte Whitbread*, 19 Ves. 210; *Ex parte Kensington*, 2 V. & B. 83.

The effect of a mere deposit of title-deeds to secure a sum of money has been thus stated by Sir R. T. Kindersley, V. C.: "By the deposit the mortgagor contracts that his interest shall be liable to the debt, and that he will make such conveyance or assurance as may be necessary to vest his interest in the mortgagee." *Pryce v. Bury*, 2 Drew. 42.

But the terms of an agreement upon the deposit of the deeds, may show the intention of the parties to have been different. Thus, in *Sporle v. Whayman* (20 Beav. 607), title-deeds were deposited by the defendant with the plaintiff as an *indemnity against continuing payments to which he might become liable as security [*677] upon a joint and several promissory note, but there was *no agreement to execute a formal mortgage*. Before the plaintiff had made any payment, he filed a bill to have a formal mortgage executed. It was held, however, by Sir J. Romilly, M. R., that he was not entitled thereto, but only to a memorandum, signed by the defendant, specifying the terms of the deposit. "The plaintiff," said his Honor, "wants to preserve evidence of the terms of the deposit; I think he is entitled to have it in writing, in order to make it effectual, if ever he should be called upon to pay the promissory note. His right is clear; for suppose, after the lapse of four or five years, the plaintiff should be called on to pay any part of the debt, if the defendant were dead, the terms of the agreement might then be contested. This Court daily sees the great

inconvenience which arises from depositing deeds without clear written evidence of what they are to secure. Thinking that the plaintiff is entitled to have evidence in writing, I have then specifically to perform the agreement; and I am of opinion that the plaintiff is entitled to receive a memorandum, signed by the defendant, specifying the terms on which the title-deeds were deposited. I shall direct him to sign such memorandum, and the terms of it must be settled in chambers if the parties disagree."

It may here be remarked, that the recent case of *Chapman v. Chapman* (13 Beav. 308) seems to be adverse to the dictum of Lord Eldon in *Ex parte Coming* (see ante, p. 675), as to the effect of the mere adverse possession of deeds to give an interest in land. In *Chapman v. Chapman*, a bill filed in 1846 alleged a loan by the plaintiff to the testator in the year 1827, upon his bond and a deposit of the title-deeds of a freehold estate.

The testator died in 1831, and interest on the debt had been regularly paid by his executors until October, 1843. No evidence was given of the circumstances under which the deeds had come into the possession of the plaintiff, and there was no admission of an equitable deposit by the persons entitled to the estate. It was held by Lord Langdale, M. R., that what had taken place neither constituted a valid equitable mortgage, nor a sufficient ground for an inquiry before the Master. "The only evidence," said his Lordship, "is this:—the title-deeds are produced from the present possession of a party who is also a bond creditor, and nothing whatever is proved connecting the bond with the possession of the title-deeds. The simple statement of the case, therefore, is, that at this time, being a great many years after the alleged transaction, the title-deeds are discovered to be in, and are produced from, [*678] the possession of the bond creditor. I am of opinion *that this is not sufficient to support an equitable mortgage." Sed vide *Smith v. Constant*, 4 De G. & Sm. 213, 216; *Burgess v. Moxon*, 2 Jur. N. S. 1059; *Shaw v. Foster*, 5 L. R. Ho. Lo. 321.

In *Russel v. Russel* it was only decided that the deeds were a security for the sum advanced at the time of the deposit. The rule, however, has been enlarged, and the security been held to extend to subsequent advances, upon proof of an agreement that the deposit was originally made as a security as well for the first as for any subsequent advance, or upon proof that any subsequent advance was made upon the understanding that the deeds were to be a security for it (*Ex parte Langston*, 17 Ves. 227; *Ex parte Whitbread*, 19 Ves. 209; *Ex parte Kington*, 2 V. & B. 79; *Ex parte Nettleship, re Burkhill*, 2 M. D. & De G. 124; *Ede v. Knowles*, 2 Y. & C. C. C. 172; *Baynard v. Woolley*, 20 Beav. 583, 586); for Lord Eldon said, that this distinction appeared to him to be too thin, that you should not have the benefit of such an agreement, unless you added to the terms of that agreement the fact

that the deeds were put back into the hands of the owner, and a re-delivery of them required; on which fact there is no doubt that the deposit would amount to an equitable lien within the principle of the cases: *Ex parte Kensington*, 2 V. & B. 83.

Upon the same principle, where money had been advanced, previous to the abolition of the usury laws, at 6l. per cent., on a promissory note, and a deposit of title-deeds of freehold property as a collateral security, and afterwards it was agreed by parol that a legal mortgage should be executed to secure the principal, and interest at 5l. per cent., but no mortgage was executed, it was held by the Lords Justices (overruling the decision of Sir W. Page Wood, V. C.; reported Kay. 423), that the parol agreement was sufficient to change the illegal into a legal contract, and that a return and the fresh deposit of deeds was not necessary to take the second contract out of the Statute of Frauds. "The deeds," said Lord Justice Turner, "being in the hands of the plaintiff, and there being a parol agreement to give him a legal mortgage, I think the case falls within the principle of *Ex parte Kensington* (2 V. & B. 79; 2 Rose, 138), and that the plaintiff is entitled to a decree." *James v. Rice*, 5 De G. Mac. & G. 461.

Where an equitable mortgage by deposit of title-deeds has been made, accompanied by an instrument which by mistake has been drawn up in such a manner as to be illegal, as, for instance, void for usury, when the laws against usury were in force, the Court, on being satisfied of the error, will reform the instrument so that effect may be given to the equitable deposit: *Hodgkinson v. Wyatt*, 9 Beav. 566.

*In *Ashton v. Dalton*, 2 Coll. 565, a debtor had deposited his title-deeds with his creditor until such time as his account [679] should not exceed 100l., at which time they were to be restored to him. The debtor died indebted to the creditor in 274l. It was held by Sir J. L. Knight Bruce, V. C., that the deeds so deposited were a security for the whole 274l.

Where there has been a deposit of title-deeds for the purpose of preparing a legal mortgage, the question has arisen, whether that constitutes a good equitable mortgage. In *Brander v. Boles*, Prec. Ch. 375, it was decided that it did not; but the reporter states that no reason was given for the decree. Lord Hardwicke was of the same opinion, in *Brisick v. Manners*, 9 Mod. 284. So, also, in *Ex parte Bulteel*, 2 Cox, 243, where A. being indebted to B. & Co., bankers, they pressed for a real security, which A. agreed to give, and sent the title-deeds to the bankers, who delivered them to an attorney with instructions to prepare a security, but before it was executed A. became bankrupt, Lord Thurlow, C., observed, that the case did not come within the rule which had been established, that the deposit of title-deeds as a security for money should be taken as a mortgage, for that the deeds were not deposited expressly as a pledge for securing any

particular sum, but were delivered to an attorney for the purpose of enabling him to prepare a security, which was to be afterwards executed; but the bankruptcy intervening, prevented the transaction being effected. So, also, in *Norris v. Wilkinson*, 12 Ves. 192, where the person who had undertaken to execute a mortgage, and had handed over the deeds for that purpose, died before it could be prepared, Sir W. Grant, M. R., held, that it was not an equitable mortgage. "In all the cases," he observed, "that have been referred to, the deeds were delivered by way of deposit. Such deposit was, indeed, held to imply an obligation to execute a legal conveyance whenever it should be required; but the primary intention was to execute an immediate pledge, with an implied engagement to do all that might be necessary to render the pledge effectual for its purpose. But here there was no intention to put the deeds into pledge; that was not the thing which any of the parties had in contemplation: all that is alleged is, that the defendant had undertaken to execute a mortgage when a mortgage should be prepared; and it is admitted that the delivery of the deeds was to be made only a step towards its preparation. Can the accident of the death of the intended mortgagor give to such a delivery an effect which originally it was not intended to have?" And see *King v. Benson*, [*680] cited 6 Price, 467. And Lord Eldon was of the same *opinion in *Ex parte Hooper*, 1 Mer. 7, and *Ex parte Pearse and Prothero*, 1 Buck, 525. On the other hand, Lord Kenyon, in *Edge v. Worthington*, 1 Cox, 211, held, that an agreement to give a legal mortgage, with a deposit of the title-deeds for the purpose of preparing the legal mortgage, constituted a valid equitable mortgage. So, also, Lord Eldon, in *Ex parte Bruce*, 1 Rose, 374, where he observed that the principle of equitable mortgages was, that the deposit of the deeds was evidence of the agreement: but if they were deposited for the express purpose of preparing the security of a legal mortgage, that was stronger than an implied intention. This case has been followed by Lord Gifford, M. R., in *Hockley v. Bantock*, 1 Russ. 141; and Lord Abinger, in *Keys v. Williams*, 3 Y. & C. Exch. Ca. 62, observes, that, if it were necessary to decide the specific point, he should say, that an agreement to grant a mortgage for money already advanced, and a deposit of deeds for the purpose of preparing a mortgage, is, in itself, an equitable mortgage by deposit; but in that case the deposit was evidently made as a present security, as well as with a view of preparing a future mortgage. Lord Eldon's opinions, in *Ex parte Hooper*, 1 Mer. 7, and *Ex parte Pearse and Prothero*, 1 Buck, 527, cannot be reconciled with his decision in *Ex parte Bruce*; but it will be observed, that neither the last-mentioned case, nor *Edge v. Worthington*, was cited in those cases. Upon the whole, taking into consideration that *Brander v. Boles*, and *Risick v. Manners*, were decided before *Russel v. Russel*, and that *Edge v. Worthington* was neither in print, nor noticed, when

Norris v. Wilkinson was argued before Sir W. Grant, M. R., we may arrive at the conclusion, that the balance of authority is in favour of the proposition, that a delivery of deeds for the purpose of preparing a legal mortgage constitutes, in fact, a valid equitable mortgage. See also *James v. Rice*, 5 De G. Mac. & G. 461; *Bulfin v. Dunne*, 11 Ir. Ch. Rep. 198.

Although a mere deposit of deeds, without any express agreement either by parol or in writing, constitutes a valid equitable mortgage, yet, if the circumstances under which they are left are such as raise an inference that a deposit was not intended, the same result does not follow; as, for instance, where title-deeds were left in the counting-house of a banker, after he had refused to advance money on them, it was held that no valid equitable mortgage was created: *Lucas v. Dorrein*, 7 Taunt. 278; 1 J. B. Moore, 29. In *Wardle v. Oakley*, 36 Beav. 27, Oakley, by deed, mortgaged freeholds to Phillips, and at the same time the title-deeds, not only of the freeholds, but of leaseholds belonging to Oakley, were delivered to *Phillips. Afterwards a further charge, by way of indorsement, was executed on the first [681] deed, and this deed did not include the leaseholds. It was held by Lord Romilly, M. R., in the absence of proof to the contrary, that Phillips had no lien on the leaseholds for the money advanced. "If," said his Lordship, "the leaseholds were intended to be included in the mortgage security, why were they omitted from the deeds? and why, if meant to be an additional security by way of deposit, was no memorandum made of it? and why is there a total blank of any evidence of such an intention on either side? If I accidentally deliver a box of deeds to a creditor of mine, that would not constitute him an equitable mortgagee. It might well be that the delivery of the deeds would be prima facie evidence of such intention, which would throw the burthen of proving the negative on the owner; but if that is so, I think that in the present case this burthen is fully discharged by the production and examination of the contents, purport, and effect of the two mortgage deeds executed by Mr. Oakley to the testator (Phillips), which show the extent of the contract between the parties, what one intended to include in the mortgage, and what the other accepted as a sufficient security. I am of opinion that the deeds in question were sent by mistake with the deeds relating to the freeholds to Mr. Phillips, and that he neither contracted for, nor intended to contract for, any additional security on the leaseholds by way of equitable mortgage, and that the possession of the deeds, in such circumstances, confers no lien."

Where there is a statement or memorandum in writing of the circumstances under which the deposit was made, parol evidence is not admissible to contradict it (*Ex parte Coombe*, 17 Ves. 369; and see *Baynard v. Woolley*, 20 Beav. 583): but it is admissible to extend a lien evidenced by a memorandum in writing. See *Ex parte Kensington*, 2 V.

& B. 79, and *Ex parte Nettleship*, 2 M. D. & De G. 124, where Sir John Cross held, that an agreement in writing, accompanying the deposit of title deeds, to secure a specific sum, might be extended as a security beyond that sum by a subsequent verbal agreement.

A memorandum in writing accompanying a deposit of title deeds, it seems, requires an ad valorem stamp: *Collins' Stamp Laws*, 176; *Wise v. Charlton*, 1836, 4 Ad. & Ell. 786; 6 N. & M. 364. But where the agreement, in consequence of being unstamped, is inadmissible as evidence, other parol evidence may be given in order to establish the equitable mortgage: *Hiern v. Mill*, 13 Ves. 114.

A parol agreement to deposit title deeds for a sum of money [*682] advanced does not, without an actual deposit, constitute a good equitable mortgage: *Ex parte Coombe, re Beavan*, 4 Madd. 249. However, in *Ex parte Farley*, 1 M. D. & De G. 683, where deeds relating to a trust estate were deposited for safe custody with a banking firm, a partner in which was one of the trustees, the firm made advances to one of the cestui que trusts, on a parol agreement for a lien on his share, and the cestui que trust promised by letter, that, as soon as a partition could be effected of the property, he would give the firm a security for the full amount of the account; and some time afterwards, the partition having taken place, he signed a memorandum, stating that he had deposited the deeds therein described as a collateral security for any advance which the firm might make on his account; but the deed of partition was not deposited. It was nevertheless held, that the firm were equitable mortgagees of the estates taken in partition, and that the security extended to past as well as future advances.

Formerly, the memorandum of deposit of deeds to secure an annuity required enrolment, under 53 Geo. 3, c. 141, and 3 Geo. 4, c. 92 (*Ex parte Miller*, 3 De G. & Sm. 553); but those Acts, which were passed in order to prevent evasion of the usury laws, were, upon the abolition of those laws, repealed (17 & 18 Vict. c. 90), so that enrolment in such cases is not now necessary; but by a subsequent Act (18 & 19 Vic. c. 15, s. 12) registration in the Common Pleas, as against purchasers, mortgagees, and creditors, is requisite.

A deposit of deeds with the wife of the depositor, to be kept by her for the creditor, was held by Lord Eldon, C., not to constitute a valid equitable mortgage: *Ex parte Coming*, 9 Ves. 115, where his Lordship observed, "No case has gone the length, though I do not see the reason, that, if, the deposit is in the hands of a person who could fairly be called a third person, abstracted from both, that can be considered a deposit for the creditor, provided that is proved to be the intention. But it is very delicate when the deposit remains in the hands of the mortgagor himself; and I doubt much whether a mere memorandum, kept in his own possession, and not parted with to the man in whose favour it is expressed, would take it out of the statute. It is

very nearly the same where the deeds are put into the hands of the wife of the mortgagor, to keep them as between her husband and the creditor."

In the recent case of *Ferris v. Mullins* (2 Sm. & Giff. 378), the secretary of a banking company had a credit account with the bank to the extent of 3000*l.*, secured by a memorandum specifying *certain securities deposited by way of equitable mortgage. On his [*683] dying indebted to the bank in 4000*l.*, there were found in his office in the banking-house the securities mentioned in the memorandum, with others tied in a bundle and indorsed and labelled as securities, together with other securities kept by him for the bank. It was held by Sir John Stuart, V. C., that the bank had a good equitable mortgage on all the securities in the bundle.

Where a deposit of deeds has been made with a firm, if it is the intention of the parties that the deposit should be for the benefit of any future members of a firm, it is necessary that such intention should either be expressly stated in the memorandum made on the deposit, or be proved by parol evidence (*Ex parte Kensington*, 2 V. & B. 79, 83); —but dealings with the new firm may afford sufficient evidence of a new agreement with them, so as to give them the benefit of the deposit: *Ex parte Oakes, re Worters*, 2 M. D. & De G. 234; *Ex parte Smith*, *lb.* 314.

If there is a contest upon the question, as to whether money was advanced upon the deposit of deeds or not, the Court will decide it, even upon a claim, where there is a clear preponderance on one side: *Smith v. Constant*, 4 De G. & Sm. 213.

Another question sometimes arises, which, in *Ex parte Wetherell* (11 Ves. 398), Lord Eldon said, had never been decided, viz., how far it is necessary to deliver all the title-deeds relating to an estate. In *Ex parte Pearse and Prothero*, 1 Buck, 525, where A. agreed with B. to execute a mortgage of certain premises for the security of a debt, and he sent, in order that B. might prepare the mortgage, all the title-deeds, except the immediate conveyance to himself, A., being also indebted to C., took that conveyance and deposited it with C. as a security for his debt, at the same time promising to send him the remainder of the title-deeds. Lord Eldon said the question was, whether these two creditors were to be considered as equitable mortgagees, by force of their respective deposits? and if they were, which of them was to have the preference? Suppose the deeds had been divided amongst twenty different creditors, would each of them have been equitable mortgagees, or could they altogether have formed one mortgagee? The case having been again argued, his Lordship was of opinion, after a great deal of consideration, that neither of them had an equitable mortgage. "How far the assignees," he said, "can get the deeds from them, is another mat-

ter. It is enough to say, that it was not the intention of the one, that he should have a mortgage till an actual one was executed to him, and [*684] that the other was not to have an equitable *mortgage till he got possession of the whole of the deeds."

But it is clear now that an equitable mortgage may be created by a deposit of *part* of the title-deeds only: *Ex parte Chippendale*, 1 Deac. 67; *S. C.*, 2 M. & A. 299; *Whitbread v. Jordan*, 1 Y. & C. Exch. Ca. 303; *Lacon v. Allen*, 3 Drew. 579.

Nor is it necessary that the deeds deposited should show a good title in the depositor, as, for instance, when he deposits all the deeds except the conveyance to himself: *Roberts v. Croft*, 24 Beav. 223; 2 De G. & Jo. 1.

The question, however, may arise, when part of the deeds are deposited with one person and afterwards another part with another person, which of them is entitled to priority? And it seems, that when a valid equitable mortgage has been created by the first deposit, and there has been no conduct on the part of the person claiming in respect of it, such as fraud or gross negligence, to give a better equity to the person claiming under the second deposit, the ordinary rule, *qui prior est tempore potior est jure*, will be applicable: *Roberts v. Croft*, 24 Beav. 223, 2 De G. & Jo. 1; *Dixon v. Muckleston*, 20 W. R. (M. R.) 619.

A deposit of deeds, relating to part of an estate, with a representation that they relate to the whole, will not create an equitable mortgage over the whole of the property, but merely over that part actually comprised in the deeds so deposited (*Jones v. Williams*, 24 Beav. 47); but the depositor may, under another head of equity, be compelled to make his representation good: *Roberts v. Croft*, 24 Beav. 229.

Although deeds deposited by way of equitable mortgage apply to various properties, if it is apparent on the memorandum accompanying the deposit, and the dealings of the parties that a portion only of those properties was intended as a security, the lien of the depositor will extend no further than that portion: *Wylde v. Radford*, 33 L. J., N. S. Ch. 51; 12 W. R. (V. C. K.) 38.

There may be a valid equitable mortgage made by a direction to third parties to hand over the deeds to another. Thus, in *Daw v. Terrell*, 33 Beav. 218, A. B. being entitled to three properties, the title-deeds of one of which were held by his bankers as a security, deposited the title-deeds of the other two with C. D. as a security for a debt, and he gave him an order on the bankers (written by himself, but not signed), to deliver over the deeds of the third property when their lien had been satisfied. It was held by Sir John Romilly, M. R., that this gave C. D. a valid equitable mortgage on the property mortgaged to the bankers.

As against whom a Deposit of Title-deeds is good.—A partial owner,

as tenant for life, can only affect his own interest by a deposit *of the title-deeds: *Williams v. Medlicott*, 6 Price, 495; *Turner v. Letts*, 20 Beav. 185. [*685]

Where a deposit of deeds relating to copyholds, was made to secure a sum of money advanced to one of two tenants in common in tail, with cross remainders between them, who, at the same time, signed a memorandum stating this, and also "that he engaged to make a surrender of his interest when required," and the other tenant in common signed a memorandum as follows: "I join in the deposit," it was held by Sir R. T. Kindersley, V. C., that the debt was only a charge upon the moiety belonging to the one to whom the money was advanced, although by the death of the other he had become entitled to the whole property: *Pryce v. Bury*, 2 Drew. 11.

A delivery over of the title-deeds by a legal mortgagee, or by a depositary, to a third person, will operate in equity as a transfer of the mortgage, but the original depositor will be entitled to the deeds, upon payment of the sum to secure which they were originally deposited, although a larger sum may be due to the sub-depositary; *Wallwyn v. Assignees of Shephard*, 4 Ves. 119; *Ex parte Smith*, 2 Deac. & C. 271; 1 V. & B. 518. In *Ex parte Tuffnell, re Watts* (4 Deac. & C. 29; 1 M. & A. 620), where a bankrupt, having a mortgage term, deposited the mortgage-deed with a person, by way of equitable mortgage, and afterwards purchased the equity of redemption, it was held, that the assignees had a right to a re-delivery of the mortgage-deed, on satisfying the lien of the equitable mortgagee; if they did not do so, the whole of the bankrupt's interest in the property was to be sold, and the assignees were to join in the conveyance to the purchaser.

A deposit of an agreement for a lease by a person having only a lien upon the property will, as against the lien, create a charge for the amount advanced upon the deposit; *The Unity Joint-Stock Mutual Banking Association v. King*, 25 Beav. 72.

A husband, by mere transfer, although for value, of title-deeds, of which his wife is equitable mortgagee, does not by the deposit reduce the sum secured thereby into possession, so as to defeat the right of his wife by survivorship. See *Michelmores v. Mudge*, 2 Giff. 188, where the husband had deposited for value title-deeds of which his wife was equitable mortgagee, and having received a part only of the mortgage-money, died before his wife. Sir J. Stuart, V. C., held, that except as to the mortgage-money received by the husband, there had been no actual reduction into possession, and that consequently the wife was unaffected by her husband's transfer of the deeds.

"In the present case," said his Honor, "the only act of the husband *which can be urged as a reduction into possession was, his [*686] dealing with the title-deeds, which were in his possession in right of his wife, who was the mortgagee. These title-deeds were un-

questionably chattels which the husband held in right of his wife. He had the present right to call in the mortgage monies, and if he had done so, the right of the wife would have been wholly extinguished.

"But what the husband did was to receive a part of the mortgage-money; and—having in his possession the title-deeds, which were his wife's chattels, though held only as a security for money,—he deposited these deeds for his own benefit in the hands of a person who held them as a security by way of equitable mortgage.

"As to so much of the money as was actually received by the husband, there was a complete reduction into his possession, so as to defeat the wife's title by survivorship. But as to the rest, the mere possession of the deeds cannot be equivalent to possession of the money. If the husband's possession of the deed is not sufficient to bar the wife's right, his transfer of that possession cannot on principle make any difference. In order to defeat the wife's title, it must be shown that the assignee exercised the right which he acquired by the deposit of the title-deeds. But nothing of the kind was done, and therefore the transaction amounted to nothing more than the deposit by the husband of his wife's chattels as a security for his debt, with a right in the assignee to reduce the property in possession, which was not exercised. Then how does the case now stand? The husband died, leaving the right of reduction into possession unexercised by himself or his assignee, and therefore the title of the wife, by survivorship, arose on his death." ●

A deposit of deeds is good as against the Crown, if made before the depositor became a debtor to the Crown, by record or specialty; *Casberd v. Ward*, 6 Price, 411; *S. C.*, Dan. 239.

So, also, a deposit, as in the principal case, is valid as against the creditors of a bankrupt, unless it was made so near the bankruptcy in point of time, that, not being given under pressure, it may be held a fraudulent preference; in which case the depositary will, upon a petition, be ordered to deliver up the deeds: *Ex parte Ainsworth*, *Re Goren*, 3 M. & A. 457.

It may be considered now as finally decided, (notwithstanding the stat. 1 & 2 Vict. c. 110, which gives to a judgment the effect of an equitable charge upon the land of the debtor) that an equitable mortgagee, by deposit of title-deeds, retains his right in equity to enforce his security against the title of a creditor under a subsequent judgment, [*687] although the latter may have acquired the legal seisin and possession of the land under an elegit, without notice of the equitable mortgage; *Whitworth v. Gaugain*, 3 Hare, 416, affirmed by Lord Lyndhurst, C., 1 Ph. 728; *Abbott v. Stratton*, 9 Ir. Eq. Rep. 233; *Anderson v. Kemshead*, 16 Beav. 329, 344; *Battersby v. Homan*, 2 Ir. Ch. Rep. 232.

An equitable mortgagee, by deposit of title-deeds, will be entitled to priority over a subsequent legal mortgagee, who advanced his money

with notice of the deposit. See *Birch v. Ellames*, 2 Anst. 427, and *Hiern v. Mill*, 13 Ves. 114, where it was decided, that notice will be imputed to a subsequent purchaser or mortgagee, if he knew that the title-deeds had been put by the owner into the possession of another: *Dryden v. Frost*, 3 My. & Cr. 670; and see *Jones v. Williams*, 5 W. R. 540.

Where, however, the solicitor of the depositor has the deeds as equitable mortgagee, a subsequent purchaser having notice merely of the fact that the deeds are in the possession of the solicitor, will not be considered to have notice of the equitable mortgage, because it is the usual course of affairs that a solicitor should have his client's deeds. A solicitor, therefore, upon his becoming equitable mortgagee, should, in order to affect third parties, give express notice to them: see *Bozon v. Williams*, 3 Y. & J. 150.

An equitable mortgagee by deposit of title-deeds of lands in Middlesex is within the provision of the Registration Act, 7 Anne, c. 20, and by earlier registration of the memorandum accompanying the deposit, even on the same day, he will acquire priority over another equitable mortgagee prior in date, but subsequent in registration: *Neve v. Pennell*, 2 Hem. & Mill. 170; *Moore v. Culverhouse*, 27 Beav. 639; but see *Wright v. Stanfield*, 27 Beav. 8.

With reference to the question when notice will be imputed to a legal mortgagee, so as to postpone him to a prior equitable mortgagee having the title-deeds, the following summary of the law has been laid down by Sir George Turner, V. C.: "That a legal mortgagee is not to be postponed to a prior equitable one, upon the ground of his not having got in the title-deeds, unless there be fraud, or gross and wilful negligence on his part; that the Court will not impute fraud or gross or wilful negligence to the mortgagee, if he has bona fide inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them; but that the Court will impute fraud, or gross and wilful negligence to the mortgagee, if he omits all inquiry as to the deeds. And I think there is much principle both in the rule and the distinctions upon it. When this Court is called upon to postpone a legal mortgagee, its powers are invoked to take away *a legal right; and I see no ground which can justify it in doing so, except fraud or gross and wilful negligence, which in the eye of this Court amounts to fraud; and I think that in transactions of sale and mortgage of estates, if there be no inquiry as to the title-deeds which constitute the sole evidence of the title to such property, the Court is justified in assuming that the purchaser or mortgagee has abstained from making the inquiry, from a suspicion that his title would be affected if it was made, and is therefore bound to impute to him the knowledge which the inquiry, if made, would have imparted. But I think if a bona fide inquiry is made, and a reasonable excuse given, there is no ground for

imputing the suspicion or the notice which is consequent upon it:" *Hewitt v. Loosemore*, 9 Hare, 458; and see notes to *Le Neve v. Le Neve*, L. Cas. Eq. vol. ii. In *Ratcliffe v. Bernard*, 6 L. R. Ch. App. 652, an equitable mortgagee with whom some of the title-deeds of the mortgaged property, including the conveyance to the mortgagor, were deposited, filed a bill to establish his priority over a subsequent legal mortgagee whose solicitor had omitted to examine a parcel which was given to him previously to the execution of the mortgage deed, and purported to contain all the title-deeds, but contained only the earlier deeds. It was held by Sir W. M. James, L. J., that there was not such wilful negligence on the part of the solicitor as to fix the legal mortgagee with constructive notice of the prior charge, so as to entitle the equitable mortgagee to enforce in equity his priority over the legal mortgagee.

An equitable mortgagee, who advanced his money bona fide, may protect his equitable estate and gain priority, by obtaining the legal estate from his debtor, even in contemplation of his bankruptcy. "So much," observes Lord Eldon, "is the equitable title from the possession of the deeds recognised, even at law, that if a man, having made the deposit previously, makes a title accordingly only two minutes before he absconds, it is a legal title, and cannot be impeached; for, though the legal act was done in contemplation of bankruptcy, it is protected by the previous equitable title being only effect given to a title created not in contemplation of bankruptcy, and, except in form, complete by the deposit."—Per Lord Eldon in *Hiern v. Mill*, 13 Ves. 122; see also *Baynard v. Woolley*, 20 Beav. 583.

As a general rule, an equitable mortgagee is liable to all the equities affecting the depositor. Thus in *Parker v. Clarke*, 30 Beav. 54, Clarke, who was the transferee with notice of a mortgage obtained without [*689] consideration, deposited the mortgage and *transfer with Phillips, who had no notice of the circumstances under which the mortgage had been obtained. Sir John Romilly, M. R., held that Phillips could only take what Clarke could give him, and that he could not be in a better situation than Clarke himself; that Phillips "ought to deliver up the deeds, and his only remedy was against Clarke."

So where a trustee deposits title-deeds in breach of trust, it is immaterial whether the depositary has notice of the trust or not; because he takes only an equitable interest, which must yield to the prior equity of the cestui que trust: *Manningford v. Toleman*, 1 Coll. 670; and see *Welchman v. The Coventry Union Bank*, 8 W. R. (V. C. W.) 729.

But the above rule is subject to exceptions, where a person having a prior equity, by his negligence enables another to create a subsequent equitable mortgage. Thus, an equitable mortgagee who parts with the title-deeds, and so enables the depositor to make another equitable

mortgage, may be postponed to such second equitable mortgagee, by reason of his laches in not getting back the deeds. See *Waldron v. Sloper*, 1 Drew. 193; there Sloper, in 1834, made an equitable mortgage by deposit of title-deeds to Matthews. In January, 1840, Matthews deposited these deeds with Waldron, the plaintiff, by way of equitable mortgage. In April, 1842, Matthews applied to the plaintiff for the loan of the deeds, telling him he wanted them to enable a purchase to be completed, and promising to return them forthwith. He did not return them, and the plaintiff never applied to have the deeds back for more than four years. In May, 1843, Matthews deposited the deeds, by way of mortgage, with Pinckney. It was held by Sir R. T. Kindersley, V. C., that Pinckney was entitled to priority over the plaintiff. "It is an elementary principle," said his Honor, "that a party coming into equity in such a case, is bound to show that he has not been guilty of such a degree of neglect as to enable another party so to deal with that which was the plaintiff's right, as to induce an innocent party to assume that he was dealing with his own. If, here, ordinary diligence had been used by the plaintiff, if, instead of resting satisfied with the excuses of Matthews, he had insisted on the deeds being returned, not in one or two months, but even in nine or twelve months, even then, in the events that have happened, Matthews could not have committed the fraud. But Matthews having committed the fraud in 1843, in consequence of the neglect of the plaintiff from then to December, 1846, Pinckney was induced to go on making advances to Matthews on the faith of his possession of the deeds. If ever there *was a case in which, as between two innocent parties, that one must suffer who has permitted the fraud to be committed, it is [*690] this case; and I am of opinion that the plaintiff, who by his great neglect put it in the power of Matthews to commit the fraud, has no right to come and ask equity to interfere."

In *Adsetts v. Hives*, 33 Beav. 52, A. B., through a solicitor, borrowed money from C. D., upon a deposit of title-deeds. The solicitor obtained the deeds back for the purpose, as he stated, of preparing a legal mortgage. Instead of this, he got A. B. to execute a legal mortgage to himself, instead of to C. D., and he afterwards raised money on a transfer of this mortgage and on a delivery of the title-deeds from a creditor without notice. It was held by Sir J. Romilly, M. R., that A. B. was liable to pay both mortgages.

Where an equitable mortgagee neglects to get possession of the title-deeds to the mortgaged property, he will be postponed to a subsequent equitable mortgagee without notice who has got such possession. Thus in *Layard v. Maud*, 4 L. R. Eq. 397, Edwards Wood, having contracted to purchase an advowson, borrowed from Austen 2500*l.*, and covenanted with him to pay for and convey the advowson to him within six months. Edwards Wood completed the purchase of the advowson,

but never conveyed it under the covenant. He subsequently borrowed 1000*l.* from C. & T. Halford, who had no notice of any prior incumbrance, and covenanted to convey to them the advowson, and deposited with them the title-deeds, but there was no conveyance of the legal estate. It was held by Sir R. Malins, V. C., that the first mortgage must be postponed to the second. "I have not," said his Honor, "a shadow of doubt, that where there is merely an equitable mortgage, unaccompanied by the legal estate, in every case where the equitable mortgagee either omits to get, or, having got, gives up possession of the deeds, he must always be postponed. In this case I come to the conclusion that there is that degree of negligence in Mr. Austen which will postpone his claim as first mortgagee to that of Messrs. Halford. I decide this case on the general principle, that one equitable mortgagee, without possession of the deeds, must be postponed to another who has that possession."

Where a legal mortgagee, by his negligence in giving up the title-deeds, enables the mortgagee to commit a fraud by depositing them, so as to create an equitable mortgage, the legal mortgagee will be postponed to such equitable mortgagee if he had no notice of the legal mortgage. See *Briggs v. Jones*, 10 L. R. Eq. 92; there the plaintiff, a mortgagee of leasehold property, lent the lease to the mortgagor, for the purpose of raising money upon it, but at the same time told the mortgagor to inform the person from whom he proposed to borrow the money, that the plaintiff had a prior charge. The mortgagor borrowed money from his bankers, upon a security of a deposit of the lease, without giving them notice of the plaintiff's mortgage. It was held by Lord Romilly, M. R., that the plaintiff's mortgage ought to be postponed to that of the bankers. See also *M'Henry v. Davies*, 10 L. R. Eq. 88; *Perry-Herrick v. Attwood*, 25 Beav. 205; 2 De G. & Jo. 21.

Upon the same principle was decided the recent case of *Hunter v. Walters*, 7 L. R. Ch. App. 75. There Hunter and Darnell were two mortgagees of an estate, the title-deeds of which were placed in the hands of Walters, a solicitor in whom all parties had implicit confidence. Walters, without authority from any of the parties, sold the estate to a nominal purchaser, who resold it to Walters himself, and the conveyance, dated in June, 1853, was made in execution of a power of sale in Darnell's mortgage. Hunter and Darnell both executed the conveyance, in ignorance of its contents, and believing it to be a merely formal deed, and also signed endorsed receipts for money as paid to them, though no money was in fact paid to them. Walters afterwards made an equitable mortgage of the estate to Curling, representing it to be his own and unincumbered. As to Hunter, there was evidence that he was deceived by the solicitor; as to Darnell, there was evidence that he trusted the solicitor implicitly. It was held by the Court of Appeal

in Chancery, affirming the decision of Sir R. Malins, V. C. (reported 11 L. R. Eq. 292), that Curling, the equitable mortgagee, had priority over Hunter and Darnell. "It is said," observed Lord Justice James, "that assuming the legal estate to have passed to Walters, so that he was capable of conveying something, and that he had some estate in him at the time when he executed the equitable mortgage to Mr. Curling, then there are two conflicting acts in this case; that there was an equity which still remained in Darnell prior in time, and, therefore, prior to the right in equity which Mr. Curling acquired by the execution of that deed. To my mind that question is very simple. We have simply to consider whether, where an agent has committed a fraud, the principal who has trusted that agent, or another person who has dealt with him, have to answer for the consequences of that fraud; whether, where a person has, either through fraud or otherwise, executed a deed, and signed a receipt containing an *unmistakable representation of [*692] a matter of fact, the person who has so executed the deed and signed the receipt is to suffer the loss arising from an undue use made of them, or another person, who has in the ordinary course of business, without negligence or default of any kind, trusted to the documents which contained that misrepresentation,—I am of opinion that the rule of equity is the rule of common sense; that the principal must suffer for the fraud of his agent, and not the stranger who is dealing with the agent; that the man who has made the representation, under whatever circumstances, must bear the consequences of those representations, and not the man who has trusted to the representations so made."

Upon the same principle an equitable mortgagee by deposit of title-deeds, is entitled to preference over the lien of a vendor who conveyed the estate without receiving his purchase-money when the receipt for it is indorsed on the conveyance, which is with the other title-deeds delivered to the purchaser; because the equity of the mortgagee, being better than that of the vendor, who by his negligence enabled the purchaser to deal with the estate, ought to prevail over mere priority in point of time. See *Rice v. Rice*, 2 Drew. 73, and the authorities cited in Vice-Chancellor Kindersley's elaborate judgment. See ante, p. 327.

But an equitable mortgagee will not be entitled to priority if the purchaser or legal mortgagee had no notice; for, then the equities being equal, the law must prevail: *Plumb v. Fluitt*, 2 Anst. 432.

An equitable mortgagee being a purchaser for valuable consideration pro tanto, his charge will, under the 27 Eliz. c. 4, be effectual against a prior voluntary settlement; *Ede v. Knowles*, 2 Y. & C. C. C. 172; *Lister v. Turner*, 5 Hare, 281.

A memorandum of a deposit of deeds made in Ireland as a security for a debt, by a person carrying on there the ordinary business of a banker, is within the provisions of 33 Geo. 2, c. 14 (Ir.), and ought according to their requirements to be registered in order to be valid as

against creditors under a trust deed executed pursuant to the provisions of that act: *Copland v. Davies*, 5 L. R. Ho. Lo. 358.

Privileges and Remedies of Equitable Mortgagee.—A mere depositary of a lease cannot be compelled to take a legal assignment so as to enable the lessor to sue him at law on the covenants in the lease, nor is he liable to them until he has made himself legal assignee (*Moore v. Choat*, 8 Sim. 508, and cases there cited: and *Robinson v. Rosher*, 1 Y. & C. C. C. 7; *Moore v. Grey*, 2 De G. & Sm. 304; 2 Ph. 717, overruling **Lucas v. Comerford*, 1 Ves. jun. 235, and *Flight v. Bently*, 7 Sim. 149);—nor will the case be altered by his having entered into possession of the premises and paid the rent: see *Moore v. Grey*, 2 De G. & Sm. 304; 2 Ph. 717, in which case it was argued, upon appeal before Lord Cottenham, C., that, as the depositary had been in possession, and had paid rent due from the party from whom he had taken the deposit, he was liable to the covenants and was bound to take an assignment; but his Lordship held, that the depositary was not liable to the covenants entered into by the lessee. "One thing," he said, "is certain, that if this Court were to administer such relief, it would effectually prevent any body from ever hereafter taking a deposit of a lease as a security for a sum of money; for no man in his senses would take a deposit of a lease if he were thereby to render himself liable to the covenants of the lease. . . . A lessee is liable to distress from his landlord, and, the goods being distrained, some other person, from interested motives or motives of friendship, comes in and pays the demand of the landlord, taking no assignment, nor any security beyond what he had before. That, of course, cannot make him liable to any of the covenants in the lease. He pays the money for or on behalf of the party who owed it. Well, then, does his being in possession make him liable? If that were so, there would be an end of the distinction between an assignment of a lease and an under-lease. Taking an under-lease does not render you liable to all the covenants in the original lease, but taking an assignment does; which shows that the effect of possession depends upon the title under which it is taken, and that mere possession not taken under a title can go for nothing. There are three things which are alleged as constituting the liability: the being the depositary, the having paid the rent, and the having been in possession. Now, none of these things, taken separately, will make the party liable upon the covenants of the lease; and, if none of them separately will, it is very difficult by reasoning to show why they should jointly have that effect." See also *Walters v. The Northern Coal Mining Company*, 5 De G. Mac. & G. 629; *Cox v. Bishop*, 8 G. Mac. & G. 815.

A proviso making void a lease upon an assignment does not apply to a mere deposit of it: *Ex parte Cocks*, 2 Deac. 14; *Ex parte Sherman*, Buck, 462; *Ex parte Baglehole*, 1 Rose, 432.

An equitable mortgagee by deposit of a lease relating to lands in Ireland, where the lessee has been evicted for nonpayment of rent under the Irish Ejectment Acts, may file a bill for redemption against the landlord: *Geraghty v. *Malone*, 3 D. & War. 239; 1 H. L. [*694] Cas. 81.

The realisation of mortgage securities in bankruptcy (including equitable mortgages) is now regulated by the 40th section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), and the general rules 78, 79, 80, and 81, made pursuant thereto, and which are almost identical with rules 55—8 of the 19th of October, 1852, under the Bankruptcy Act, 1849, which were substituted for Lord Loughborough's Order of the 8th of March, 1794.

In bankruptcy, an equitable mortgagee, except perhaps where he has actually received the rents, *Ex parte Williams*, 13 W. R. (Bankruptcy) 564, is entitled to them from the time only of the order for sale, which is considered equivalent to the appointment of a receiver: *Ex parte Bignold*, 2 M. & A. 16; *Ex parte Carlon*, 3 M. & A. 328; 2 Deac. 333; *Ex parte Thorpe*, 3 Deac. 85; 3 M. & A. 441. Notice to the tenants to pay rent to the mortgagee does not alter the rule: *Ex parte Burrell*, 3 M. & A. 439; *Ex parte Scott*, 3 M. & A. 592.

The depositary of deeds may file a bill in the Court of Chancery for sale or foreclosure, and an absolute conveyance (*Parker v. Housefield*, 2 My. & K. 419; *Lechmere v. Clamp*, 30 Beav. 218; and *Seton on Decrees*, 444, 3d Ed., and the cases there cited; and see *Pryce v. Bury*, 2 Drew. 11; *Malone v. Geraghty*, 3 D. & W. 246; but see *Tuckley v. Thompson*, 1 J. & H. 126; *Matthews v. Goodday*, 10 W. R. (V. C. K.) 148); and six months will be allowed for redemption: *Parker v. Housefield*, 2 My. & K. 419; *Mellor v. Woods*, 1 Kee. 16, overruling *Pain v. Smith*, 2 My. & K. 417.

Although trustees may deposit deeds relating to charitable trust property, in order to secure money properly expended for the purposes of the trust, the Court will not, it seems, decree a foreclosure or sale, because it would thereby destroy the trust altogether: *Darke v. Williamson*, 25 Beav. 622.

A decree for foreclosure against an infant, notwithstanding it is enacted that the parol shall not demur (11 Geo. 4 & 1 Will. 4, c. 47, ss. 10 and 11), must give him a day to show cause against the decree after he attains twenty-one (*Price v. Carver*, 3 My. & Cr. 157; *Scholfield v. Heafield*, 7 Sim. 669); but a decree for sale against an infant will be immediate if it appears that such sale will be beneficial, and no day will be given him: *Redshaw v. Newbold*, 12 Jur. 833; *Scholfield v. Heafield*, 7 Sim. 669; and see *Seton on Decrees*, 689, 3rd Ed.

On making an order of foreclosure absolute, Sir J. Stuart, V. C., refused to add a declaration under the Trustee Act, 1850, that the mort-

[*695] gagor being out of the jurisdiction is a trustee, in *order to found upon it a subsequent application for a vesting order, his Honor observing, that "any such order, if made, must be made on a separate application:" *Smith v. Boucher*, 1 Sm. & G. 72.

An equitable mortgagee may obtain a receiver (*Curling v. Lord Leycester*, 19 Ves. 633; *Shakell v. Duke of Marlborough*, 4 Madd. 463; *Anderson v. Kemshead*, 16 Beav. 329); and he will be entitled to one on motion before the hearing, on showing the possession of deeds which raises a prima facie presumption that the deposit was made for the purpose of securing an advance of money: *Bodger v. Bodger*, 11 W. R. (V. C. K.) 160.

Where in an administration suit the personal estate is insufficient to pay the debts in full, an equitable mortgagee, who is also a simple contract creditor in respect of the same debt, and whose security is also insufficient, is entitled to prove for and take a dividend upon the entire debt for the time being actually realised by order of the Court, and the proceeds have been carried on to a separate account to meet the same mortgage claim. But such creditor must not ultimately receive more than twenty shillings in the pound from all sources: *Rhodes v. Moxhay*, 10 W. R. (V. C. S.) 103.

Although the deposit of deeds has been merely for the purpose of securing a simple contract debt, the debt will bear interest from the date of the deposit and by reason of it, though there be no express contract as to interest: see *Carey v. Doyme*, 5 Ir. Ch. Rep. 104, a decision of the Master of the Rolls in Ireland, where 5l. per cent. interest was allowed, which has since been followed by *In re Kerr's Policy*, 8 L. R. Eq. 331, where, however, only 4l. per cent. was allowed.

Where the goodwill of a business, carried on upon property included in an equitable mortgage, is sold, the equitable mortgagee will be entitled to the proceeds (*Chisum v. Dewes*, 5 Russ. 29); and fixtures, although they are not mentioned in the memorandum, or although there is no memorandum, will, upon the deposit of a lease, be considered as part of the security (*Ex parte Tagart*, 1 De G. 531; *Ex parte Cowell*, 12 Jur. 411; 11 L. J., Bank., 16; *Williams v. Evans*, 23 Beav. 239); and will not be considered upon the bankruptcy of the depositor, as being in his order and disposition within the 125th section of the Bankrupt Law consolidation Act, 1849, but will belong to the mortgagee: *Ex parte Barclay*, 5 De G. Mac. & G. 403; and see *Mather Fraser*, 3 Jur. N. S. 900; *Waterfall v. Penistone*, 3 Jur. N. S. 14.

As to the proper form of a bill by an equitable mortgagee, being also a specialty creditor, seeking to charge the real assets of a testator [*696] generally, as well as to *enforce his security, see *Blair v. Ormond*, 1 De G. & Sm. 428; and see *Hanman v. Riley*, 9 Hare, App. 40; and *Skey v. Bennett*, 2 Y. & C. C. C. 405.

Although the law of Scotland knows nothing of equitable mort-

gages, the owner of a Scotch estate can be compelled in England to give effect to a pledge made by the deposit of title-deeds: *Ex Parte Pollard*, Mont. & Ch. 239; 4 Dea. 27; *Coote v. Jecks*, 13 L. R. Eq. 597; Westl. Priv. International Law, 58.

An equitable mortgagee, by deposit of deeds is not deprived of his right to recover his debt by his inability to produce either the deeds deposited or the memorandum of deposit, when the Court believes that there was such a deposit, and that the deeds have been really lost: *Baskett v. Skeel*, 11 W. R. (V. C. W.) 1019; but he may lose his lien by voluntarily parting with the deeds: *Re Driscoll*, 1 I. Rep. Eq. 285.

It may be here mentioned that where proceedings in bankruptcy have been suspended by resolutions under the 110th section of the Bankruptcy Act, 1861, and there is nothing in the resolutions to preserve the jurisdiction of the Court of Bankruptcy, its jurisdiction to order a sale on the petition of an equitable mortgagee is gone: *In re Carter*, 1 Law Rep. Eq. 170.

Where a trustee has been appointed under the liquidation of the affairs of an equitable mortgagor, the mortgagee may, instead of applying in bankruptcy, proceed in Chancery against the trustee for the purpose of having the security realised, the jurisdiction in Chancery not being taken away by the Bankruptcy Act, 1869: *White v. Simmons*, 6 L. R. Ch. App. 555.

The principle, that a deposit of title deeds, upon a loan or advance of money, creates an equitable mortgage, has been recognized and acted upon in New York, in the case of *Rockwell v. Hobby*, 2 Sandford, Ch. 9, 12. "In the absence of all other proof," said the Assistant Vice Chancellor, "the evidence of an advance of money, and the finding of title deeds of the borrower in the possession of the lender, is held to establish an equitable mortgage. In the case before me, the deed went into the possession of the testator for some purpose. None is specifically provided; but there is an advance of money proved, an advance which went to discharge a mortgage, given in truth for a part of the

purchase-money of the land described in that deed. The only inference is, that the deed was deposited as security for the advance." In South Carolina, also, the principle appears to be admitted by Harper, C., in *Welsh v. Usher and others*, 2 Hill's Chancery, 166, 170.

The doctrine was recognized in *Mowry v. Wood*, 12 Wisconsin, 413, and *Jarvis v. Dutcher*, 16 Id. 308; and in *Griffin v. Griffin*, 3 C. E. Green, 104, the Chancellor said, that courts of equity in England and this country had long admitted the validity of an equitable mortgage by the deposit of title deeds by a debtor with his creditor as security, and have held that the mere fact that the debtor

is in possession of the deeds, gives rise to the presumption that they were deposited as a security, and constitutes an equitable lien.

In Mississippi, the doctrine has been treated as a subsisting part of the equity jurisprudence of the State, subject, however, to the same strict limitations, which are imposed upon it in England. In a case in that State, F. had purchased land from B., and received a title bond, giving his note for the consideration, with S. as his indorser, and depositing the title bond with S. for his indemnity. F.'s administrator, W., discharged the debt to B., and had the title conveyed, and subsequently claimed to be substituted to the equity of S., in regard to the title bond, on the ground that he had paid the debt for which S. was liable as indorser. "It would be difficult," said Sharkey, C. J., in delivering the opinion of the High Court of Errors and Appeals, "to sustain such a lien as that claimed, either on the law of the case, or the proof. A deposit of *all* the title deeds, as a security for a debt created *at the time* the deposit is made, is generally recognized as constituting an equitable mortgage. Such equitable liens have met with very decided opposition in England, though they have been generally sustained, but it is admitted on all hands that they should not be extended beyond their present limit. Such a mortgage is in direct opposition to the Statute of Frauds, in regard to which we have said that we will create no exceptions not found in

the statute. Lord Eldon said, that in departing from the rule of the statute that there was no rule to go by; and it was essential that those who wished to render such securities valid should learn the utility of requiring two or three lines in writing. A transfer of these equitable mortgages may be made, but it must be done in the way they are first created, by a deposit of the deeds as a security. See 3 Powell on Mortgages, 1050-1061. It is not necessary that we should hold such mortgages to be invalid in every case. The record does not furnish evidence that S. delivered the title bond to W., to be held as a security. If he did so, W. no doubt delivered it to B., the original vendor. He thereby parted with the deposit which constituted the mortgage, and did he not thereby part with the lien? No case has been cited in which such an equitable mortgage has been preserved to this extent. The equitable mortgage arises by the single act of deposit, and that act must be unequivocal. It differs very materially from a legal mortgage, which is transferred by the transfer of the debt, because it is an express lien, clearly and precisely defined by the written contract of the parties. It differs, also, from the lien of a vendor who gives a title bond." *Williams v. Stratton*, 10 Smedes & Marshall, 418, 426.

In Kentucky, the principle has been doubted, if not rejected, although the point was not actually decided. "Upon the strength of the doctrine established by Eng-

lish adjudications," said the court, in *Vanmeter v. M'Faddin et al.*, 8 B. Monroe, 435, 437, "that a deposit of title papers, creates an equitable mortgage on real estate in favor of the person to whom the deposit is made, it is contended that a lien arises in this case. This doctrine of implied lien, founded on a deposit of title deeds to an estate, made by a debtor to a creditor, as security for an antecedent debt, or upon a loan of money, although firmly established in England, has, as remarked by Judge Story, in his *Commentaries on Equity Jurisprudence*, (vol. 2, section 1020,) of late years been received, even there, with considerable hesitation and disapprobation, and a disposition has been strongly evinced not to enlarge its operation.

"We are strongly inclined to the opinion, that the mere deposit of title deeds should not be regarded, in this State, as constituting any lien upon real estate. If permitted to have this effect, an interest in landed property is created by the contract of the parties, not reduced to writing, in direct violation of the Statute of Frauds. The doctrine, no doubt, had its origin in England in the fact, that the possession of title deeds was necessary to the assertion of right to real estate; and the debtor having made a deposit of his evidences of title with his creditor, as a security, could not regain by an action at law, the possession of them until he had paid the money, to secure which they were pledged. If he made appli-

cation to a court of equity for relief, he came under the operation of the equitable rule, that he that asks equity must do equity, and, consequently, was compelled to repay the money, in consideration of which the deeds had been pledged, before he could obtain a decree for their restitution. Under our registry laws, however, the mere possession of title deeds is of no real importance to the owner of the estate; he can procure office copies and use them, without accounting for the absence of the original deeds; and the necessity which gave rise to this doctrine of implied or equitable lien having no existence here, the doctrine itself would be difficult to be maintained, either upon the ground of principle or of public policy." A deposit of title deeds cannot operate as a mortgage, under the recording acts of Ohio, against subsequent judgment creditors or purchasers, even with notice, whatever may be its effect, as between the original parties *Bloom v. Noggle*, 4 Ohio, N. S. 45, 56; and in the recent case of *Probasco v. Johnson*, 2 Disney, 96, the doctrine was said to have no place in the law of that State.

In Pennsylvania, the validity of equitable mortgages is not recognized. In *Rickett and another v. Maderia*, 1 Rawle, 325, 327, it was said that an equitable mortgage, by deposit of title deeds, might be created by parol or by written agreement, as was the case there; but in *Bowers v. Oyster*, 3 Penrose & Watts, 239, it was decided that there can be no such

thing as a valid and efficacious parol mortgage; and upon the authority of this case, it was determined, in *Shitz v. Dieffenbach*, 3 Barr, 233, that an equitable mortgage by delivery of the title deed, is not good in Pennsylvania. "Being no more than a parol mortgage," said the court, ("for it is only by parol the meaning and object of such delivery is ascertained,) it cannot now be made a question after the express decision of the point in *Bowers v. Oyster*. Whether considered as a conveyance of land, as it may ultimately prove to be, or as a lien on lands, which is its ordinary state, a parol mortgage is contrary to the spirit of our legislation in the Statute of Frauds, and acts for the recording of mortgages, and for entering up liens for public information, and to the uniform current of decisions on these subjects in Pennsylvania."

It has been held, however, in many of the courts of this country, that an agreement in writing to give a mortgage, or a mortgage defectively executed, or an imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, may create a mortgage in equity, or a specific lien, which

will have precedence of subsequent judgment creditors; *Read v. Simmons*, 2 Dessaussure, 551; *Menude v. Delaire*, Ib. 565; *Executor of Polony and Read v. Keenan and others*, 3 Id. 74; *Welsh v. Usher and others*, 2 Hill's Chancery, 167, 170; *Massey v. M'Ilwain and others*, Ib. 421, 428; *Dow et al. v. Ker et al.*, 1 Spears' Equity, 414, 417; *In the matter of Howe*, 1 Paige, 125, 130; *Bank of Muskingum v. Carpenter*, 7 Ohio, 21; *Lake v. Dodd et al.*, 10 Id. 415, 425; See *Doe ex dem. Burgess v. The Bank of Cleveland*, 3 M'Lean, 140; *The R. Road v. Tallman*, 15 Alabama, 472; *Abbott v. Godfrey*, 1 Michigan, 478; *Bloom v. Noggle*, 4 Ohio, N. S. 45; *Nelson v. The Hagerstown Bank*, 27 Maryland, 51, 76. And in *Ogden v. Ogden*, Ib. 182, an agreement between a vendor and the vendee, that a mortgage should be made to the complainant for the purchase-money, in payment of a debt due to him by the vendor, was specifically enforced by equity. In Ohio, however, unrecorded mortgages are absolutely void against judgment creditors, as well as purchasers, and cannot be rendered valid by the most express notice; see *post*, vol. 2, note to *Le Neve v. Le Neve*.

*GARTH v. SIR JOHN HIND COTTON. [*697]

JULY, 1750.

REPORTED 1 VES. 524, 546; 1 DICK. 183.¹

EQUITABLE WASTE.]—*A., tenant for ninety-nine years, if he should so long live, without impeachment of waste, voluntary waste excepted; remainder to trustees during his life, to preserve contingent remainders; remainder to his first and other sons in tail; remainder to B. in fee. A. (before a son born,) and B., according to agreement, cut down timber, and divided the profits between them. A. afterwards had a son, who was held entitled to recover from the representative of B what he had so received as his share of the money arising from the sale of the timber.*

Rights, powers, and duties of trustees to preserve contingent remainders.

Mr. GARTH,² tenant for ninety-nine years, if he should so long live, *without impeachment of waste, excepting voluntary waste; remainder to trustees during his life, to preserve contingent remainders; remainder to his first and every other son in tail; remainder to the defendant, Sir John Hind Cotton, in fee.*

Garth having been long married without having children, enters into an agreement with the defendant, Sir John Hind Cotton, to cut down timber on the estate, and divide the profits between them.

He has afterwards a son by another wife, who, after his father's death, when of age, and having suffered a recovery, brings this bill to oblige the defendant, Sir John Hind Cotton, to refund 1000*l.*, received by him as his share of the money arising from sale of the timber, with interest.

**For the Plaintiff.*—There is no particular precedent exactly as the case stands; therefore it must depend on general [*698] principles. The question is, whether they had a right to cut timber; and, if not, whether the plaintiff thereby is injured, which is necessary for the plaintiff to show, and that the defendant, at the time of doing it, was wilfully guilty of an injury to the plaintiff—that is, the unborn children of Garth; for, if this is a damage without an injury, the Court will not give satisfaction.

The trustees were to preserve the contingent uses of everything that was settled. To avoid a perpetuity was this method of preserving estates in families a certain time by inserting trustees; which (said to be invented by Lord Bridgman) has been since extended by a Court of equity. If trustees joined, the Court

¹ *S. C.*, 3 Atk. 751; Reg. Lib. 1752, A., fol. 240.

² The statement of the case and the arguments are taken from 1 Ves. 524.

would make them liable for a breach. It was by some conveyancers doubted whether the trustees joining could bar, which came first in *Pye v. George*,¹ where Lord Harcourt said, that destroying contingent remainders was a wrong, and that he would make a precedent if there was none. That precedent was afterwards solemnly made in *Munsell v. Mansell*,² where a Court of equity went further than ever, holding a purchaser to be a trustee for a contingent remainder-man. Every one doing it with notice is affected with the trust: and if the estate is got into such hands as not to be followed in equity, the Court would make the trustees liable for the breach. Thus it is on inheritances of land: a tree growing on the estate is as much a part of the inheritance as a house or the land; and, as to the person interested, selling the timber, is as much to the destruction of his inheritance as selling the land. Though there is no remedy at law, the trustees might have complained in equity that they were to preserve the contingent remainders, which might be in esse perhaps in a year, and that the Court should not suffer the present tenant for life to be guilty of that permissive waste, because it is a prejudice to one who may be in esse, and was intended by the donor to have that [*699] which is in esse. Though there is *no precedent for this, yet in many cases will the Court prohibit waste, though no action of waste lies.

If, then, the Court would do so, as being a wrong, the trustees neglecting their duty, or not knowing it, will not alter the case so as to prevent that satisfaction consequential to an injury. [*Lord Chancellor Hardwicke*. I know no case where the trustees might bring such a bill, though I have heard it said they might; and if this is so in case of a donee, it might be so in case of a purchaser.] In case of a purchaser, it would be contrary to common justice if the trustees might not bring such a bill; for then a man might immediately destroy the settlement he had made. Several injunctions have been granted where no action of waste could be, as in case of an intermediate estate for life: *Moo. 554*; where, it appears, he in remainder could have an injunction so long ago as the time of Richard II., for waste by the first tenant for life, as being an injury to his inheritance, taking away part of the value thereof. It is also an injury to the intermediate remainder man for life, and as it takes away the benefit of the shade; so that, on a bill by either, the Court would interpose, and not say, you may bring trover, but would prevent the injury. Had this been the case of an infant in ventre sa mere, entitled to the inheritance, undoubtedly a bill would lie, though he cannot bring an action, ejectment or trover, notwithstanding he may be vouched: *Musgrave v. Purry*, 2 Vern. 710. Then there is no reason but that a person who may come in esse should have the same equity as one who has a being of a month, if it may be so called. In *Abraham*

¹ 2 Salk 680; Prec. Ch. 808; 1 P. Wms. 128; 7 Bro. P. C. 221, Toml. ed.

² 2 P. Wms. 678; Ca. t. Talb. 252.

v. *Bubb*, 2 Sho. 69,¹ (though a book of no authority), is cited a case called *Lady Evelin's*, not reported in print, but in Lord Nottingham's manuscript; where it was said, that where tenant for life, remainder to the first son for life without impeachment of waste, remainder over, the first son, by leave of tenant for life, comes on the land, and sells the trees, he was enjoined in this court by Lord Nottingham; though there could be no action at law. A bill may be brought by the patron of a living to prevent the incumbent from cutting down timber; though the interest the *patron has is very little, nor any remedy in point of [*700] law, as he cannot enter, or seize the timber; but, from his remote interest in the thing in possession, the Court will relieve, because the law does not effectually, and will not say that you may go to the bishop. In *Fleming v. Fleming*, July 19, 1744, *Bishop of Carlisle's case*,² tenant for ninety-nine years, if he so long live; remainder to trustees to support contingent remainders; remainder to another for ninety-nine years, if he so long live, without impeachment of waste; remainder to his sons successively in tail male, remainders over; both tenants for ninety-nine years, thinking they had an interest together to cut down, because the second had a right to do so if in possession, agreed to sell the timber, and divide the profit, as here. On motion for injunction your Lordship granted it, holding that there was no remedy at law, and that the privilege of *without impeachment* must be considered as annexed to the estate when it comes into possession. In *Robinson v. Litton*,³ 12th December, 1744, the testator devised an estate to his eldest son and his heirs; and if he should not live to attain twenty-one, leaving no issue, devised it to his eldest daughter and the heirs of her body; remainder to his two other daughters successively in tail. The children were all infants. The son, within two years of twenty-one, petitioned to cut down timber, being for his benefit as owner of the inheritance, though subject to that contingent interest to his sisters. Your Lordship refused it, but left him to do what he could according to law. Upon that the parties agreed, that some small timber should be cut down, and then a bill should be brought by the daughters upon their contingent interest to prevent the waste, which was done; and, though that was a remote and improbable contingency, the Court thought the felling of the timber should be staid; not that the defendant could not do it in a point of law, for he had an estate of inheritance, and every such estate carries a right to cut timber; yet did the Court restrain him, and said, that if an estate descended to an heir-at-law where an executory devise was depending, that heir, notwithstanding *he would [*701] have the legal estate of inheritance in the meantime, till the contingency happens, shall not be suffered, for the sake of those persons who may come to be interested, to fell in the mean-

¹ *S. C.*, 2 Freem. 53.² *Fleming v. Bishop of Carlisle*, cited 1 Dick. 209.³ 3 Atk. 209.

time. But the defendant is not tenant in tail in possession, and therefore could not do it, though no son was born at the time. It was not a remote contingency; and it was determined in *Lewis Bowle's Case*,¹ that, if a son is born, the estate shall open. If, then, there might have been that preventive remedy by injunction, there ought to be this compensating remedy, supposing the act done. But it may be said, though *fieri non debuit factum valet*; for that, by the severing the property, it vested in the defendant as tenant in fee. If severed by act of God, as in the *Case of Welbeck Park*,² where timber was blown down on the Duke of Newcastle's estate, it would be so from the rule of law, which says, that a tree lying on the ground shall not be held in abeyance, but go to the first owner of the inheritance who might maintain trover for it. But this is not so severed, for they knowingly contrive the injury. If allowed, it will be in the power and the interest of tenant for life to bargain with a remainder-man, though ever so remote, by giving him something he could not be entitled to at all, which would encourage these collusive agreements.³ So, one made tenant for life on his marriage, reversion to himself in fee, being entitled to all windfalls, might immediately strip the estate. There is no acquiescence or length of time here, which might amount to waiver of right, or afford presumption of evidence in doubtful cases; but the plaintiff was not born until ten years after, not being of age, till 1745, and pursued it recently. There is no difficulty on defendant, in point of evidence, from length of time; but if there was, he must have seen it could not have arisen till at a distance.

For the defendant.—This is a new case; and, as admitted, not well founded on law, so neither is it in equity. Defendant, on application by plaintiff's father, agreed, provided reasonable satisfaction was made to him, not to take the advantage of felling the timber, which he might. *The bill, then, is not proper [*702] against him, without the representative of the father. At law no writ of prohibition or action of waste lay against tenant for life or years, as the parties must provide for that: since the Statute of Gloucester, indeed, it is otherwise. But to whom could the defendant be responsible? Not to the plaintiff, had he been born; for, in point of law, if he was a stranger (as a remainder-man in fee is, as to privity between him and tenant in tail), he was liable only to the lessee for life or years, who was responsible only to the person having a right to bring the action of waste; and remedy was left over against the stranger, against whom the action of waste could not be brought, as held by Lord Coke. Next, this is a personal tort, which dies with the party who alone was liable: then it would be extraordinary, if the representative of the party committing waste should not be liable, that the defendant (who was never liable to the person who could

¹ 11 Co. 79; Lead. Cas. Real Prop. 27, 2nd ed.

² Duke of Newcastle v. Vane, cited 2 P. Wms. 241.

³ Lee v. Alston, 1 Bro. C. C. 196.

bring the action, nor even to the lessee for life or years, if living, as the waste was with his consent) should now account for that waste. It is admitted, that if blown down, or cut without concurrence of defendant, he would be entitled to the benefit of the whole: how, then, is it the act of the defendant? It is singly the act of the lessee for life. Suppose the lessee had given the defendant so much money not to take the benefit of it: he might have done it for a consideration, or for none at all; for why may not one renounce a right? And this amounts to the same. Though this Court will interpose to prevent waste, yet never where the estate has ceased in the person committing it. In *Jesus College v. Bloom*,¹ Nov. 19, 1745, the plaintiffs had made a new lease to another; and, discovering afterwards that the former lessee had cut down timber and committed waste, brought a bill against him for an account thereof. Your Lordship dismissed it; for that where a lease determined, and possession was quitted, the Court will not decree an account; though, where the lease continues, it would decree an account of waste, as incidental to that jurisdiction the Court has to prohibit and enjoin it. As soon *as [*703] severed, the property belonged to the defendant, who might have seized it, or brought an action without seizing; for the father certainly had no other property than a special interest in the trees, while they continued annexed. [*Lord Chancellor Hardwicke*.—Suppose the trustees had been vigilant, and brought a bill to stay this waste, and prayed an account of the timber so felled under this agreement; I think that would be a proper bill: and, if the Court had made a decree, there would be an injunction to stay the waste; and, incident to that, the Court may decree an account of the waste already committed; what would the Court have directed to be done with the money raised by the timber sold?] The money even by the aid of this Court, would be decreed to defendant. *Udal v. Udal*, Aleyn, 81, and several other cases, shew, that the very cutting vests the property in the first owner of the inheritance. If there had been an intermediate vested remainder for life, it would make no difference; for the defendant might then have seized or brought trover, though not an action of waste; and, after the death of the intermediate tenant, might have brought *waste* for the waste in the life of that tenant. But it has never been determined, that the intermediate estate of the trustees should bar the remainder-man in fee from an action of waste or take away a legal right; which it is admitted that would not do, if they were blown down. This estate in trustees took rise on political considerations, in the time of the civil wars, to prevent any act wrongfully done to put a period to the estate; and, being created to one particular purpose, should not be wrested to another, or take away a remedy given to the owner of the inheritance by the statute. If the remainder-man in fee, by action of waste, recovers the place wasted, the re-

¹ 3 Atk. 262; Amb. 54.

mainder-man coming in esse cannot recover this estate vested ; as held in the *Case of Lincoln College*. This Court will indeed, under particular circumstance, at the instance of trustees, hearken to complaints by them ; and has gone so far, in *Mansell v. Mansell*,¹ as to declare what its sentiments would be in case of a [*704] breach of trust where the trustees *joined. But suppose they had joined, and been parties to these articles, they would not have made the legal right of the parties in the timber, when cut, different. But they did not join, nor file such bill to stay waste : and there is no instance where the Court ever interposed on their omitting to act. If by such omission a benefit accrued to another, the Court never interposes to take it away, there being instances to the contrary ; as in *Partridge v. Pawlet*, Hil. Vac. 1736, before your Lordship,² where plaintiff's wife, tenant for life without impeachment of waste, being a sickly person, was going to cut down timber, to the produce of which she would be entitled. A bill was filed on behalf of her sister to restrain her, for that the estate was subject to debts in aid of the personalty, which would probably not be sufficient for that. The Court granted the injunction. But, there being no deficiency in the personalty, a question arose, after the wife's death, between her husband and administrator and the sister, at whose instance the injunction was obtained upon an untrue suggestion, whether the estate should be put into the same condition as if no such injunction had been granted. The Court expressed an inclination to do so, if it could ; but though it was a very hard case, and a misfortune happening by act of the Court taking away a power annexed to the tenant for life, yet, as an interest was by that means attached in a third person, the Court did not think itself empowered to take away that right. Then much less will the Court, where, by the non-opposition of the trustees, a benefit accrues to a third person. *Whitfield v. Bewit*³ is a little defectively reported. It seems there, as if there were trustees to preserve, &c. ; and, if there were, that case is a direct authority.

Lord CHANCELLOR HARDWICKE.—*Partridge v. Pawlet* is not applicable to the present case.

This is of the first impression—of great consequence and importance in point of precedent : therefore I will take time to consider of it.

¹ 2 P. Wms. 678.

² 1 Atk. 467.

³ 2 P. Wms. 240 ; see also, *Bewick v. Whitfield*, 3 P. Wms. 267.

*GARTH v. SIR JOHN HIND COTTON. [*705]

AUGUST 10, 1750.

REPORTED 1 VES. 546.

LORD CHANCELLOR HARDWICKE.—Although I have taken a great deal of pains, I cannot yet form an opinion, from an apprehension of breaking in upon the rules of law, or establishing a dangerous precedent in a court of equity. The case is admitted to be entirely new. The strength of the arguments for the plaintiff is on the authority of *Pye v. George*,¹ and *Mansell v. Mansell*,² where the Court has considered trustees to preserve contingent remainders as trustees to all other purposes, so as to be affected by breach of trust and all the consequences: and therefore, if they have been negligent in not bringing a bill to restrain the waste, it should not turn to the prejudice of the remainders, when in esse. But it deserves to be considered, whether they have any trust to preserve the timber, because their legal estate is not at all for that purpose, being only an estate pour autre vie; by which there is no interest in or power over the timber, and which is at an end as soon as the first tenant for life dies. It is said, they might bring a bill for an injunction to stay waste, before the contingent remainders vested: and I am of that opinion: but I do not know that arises out of their trust for the timber. It is a bill by amicus curiæ; as in a bill on behalf of an infant in ventre sa mere, to stay waste. Till the estate attaches in possession they have nothing to do with the timber. If, indeed, there is a forfeiture for the first tenant for life, they would have a right to the shade, &c., but nothing to do with it during the life of the tenant for life. This is no opinion, but only my doubts from the breaking in on the rules of law on the one hand, and on the other the laying down a *precedent in equity which [*706] might be dangerous. Let it, therefore, be spoke to again next term. I can find no case where the Court has preserved the timber, though cut down by wrong, for the benefit of the contingent remainders. In *Whitfield v. Bewit*,³ it was not by accident, but by wrong; and though Peere Williams has not mentioned whether there were trustees to preserve, &c., I have looked into it, and find there were.

Michaelmas Term, 1750, it was argued again.

For the Plaintiff.—The bill is against the defendant only so far as he has been benefited himself by agreeing to this act, which is a detriment to the plaintiff's inheritance. The case is new in specie, but the Court will go on the general principles of law and equity. The whole merits depend on two points: *first*, whether,

¹ 2 Salk. 680.² 2 P. Wms. 678.³ 2 P. Wms. 640.

on application by the trustees at the time of the agreement, the Court would have restrained them both—the tenant for ninety-nine years from cutting by licence of the remainder-man, and the remainder-man from coming upon the estate by licence of the tenant; *next*, if so, whether satisfaction ought not to be decreed for that act, when done, which the Court would have prevented, as against conscience.

As to the *first*. To shew that the Court would have done so, it is necessary to state the notion of justice established as to preserving timber, houses, mines, and other things, capable of being, in fact, severed from the inheritance, and which yet are part of it in notion of law, and considered as annexed. There are but four cases in which a court of equity interposes to preserve an inheritance entire. First, where there is no legal remedy whatever that extends so far as to answer the intent of the settlement under which all claim, and from which intent it is clear that what is doing is wrong. This holds where tenant in tail apres possibility &c.,¹ or wife tenant in tail ex provisione viri, goes to pull down houses, or commit destruction. No action of waste or of property can be brought, yet this Court will enjoin: *Abraham v. Bubb*, 9 Sho. 69,² and *Cooke v. Whaley*, 1 Eq. Ca. Ab. 400; *be- [*707] cause the mansion-house is settled as well as the rest; and this tenant in tail apres &c. is but tenant for life, who could not do it, though he was so, without impeachment of waste. This is the most ancient jurisdiction of equity—in the time of Richard II. (Moor. 554), and several precedents in Henry VIII. and Edward VI.; but since the *Case of Raby Castle*³ it is established. There was tenant, without impeachment of waste (which since *Lewis Bowles's case*,⁴ gives leave to commit waste), yet would not this Court suffer it, because contrary to the form of the settlement, though there was no legal remedy. On the same principle have been cases as to an avenue in a park for ornament or shelter. Secondly, where there is a temporary impediment to the remedy at law, so that the act is at the time dispunishable, equity interposes; as, where there is an intermediate tenant for life, the remainder-man of inheritance cannot bring an action for waste by the first tenant for life, for the sake of the preservation of the innocent remainder for life: 2 Inst. 301. It is not so if it was a remainder for years, and it would not be destroyed by the action. But a stronger case is of an estate for life, remainder for life, without impeachment of waste, and with a power to commit waste: both agree to commit waste, and though dispunishable at law, yet this Court would enjoin, on the principle that it was an injury to the inheritance, although it was a bare contingency whether it would be a prejudice to the owner of the inheritance

¹ After possibility of issue extinct.

² 2 Eq. Ab. 757; 2 Freem. 53; 2 Swanst. 272, n.

³ *Vane v. Lord Barnard*, Prec. Ch. 454; Gilb. Eq. Rep. 127; 1 Eq. Ab. 399; 1 Salk 161; 2 Vern. 738.

⁴ 11 Co. 79.

or not; which was *Lady Evilin's case*:¹ so, in *Fleming v. Fleming*, though no remedy at law. The third case, where there is a remedy in equity only, is, where a person, who may be consequentially injured by the waste, from the weakness of his estate, has no remedy at all at law; as where tenant for life: remainder for life, with or without impeachment of waste: remainders over—on the bill of remainder-man for life, the Court would restrain the first tenant for life from committing waste: *Dayrell v. Champness*.² If guardian of infant tenant in tail cuts down the whole timber, the Court will not, on application of the remainder-man, enjoin; which was *Saville v. Saville*,³ although the infant there was very ill, and did die before he came of [*708] age: but if done in such a way as to be to the prejudice of the infant himself, on the application of the infant the Court will judge what is for his benefit. The fourth, and most material to the present case, is where new limitations are introduced and allowed by law and courts of justice, since the time that all the doctrine about waste was settled. Since the Statute of Gloucester, courts of law cannot adapt their remedy to a new purpose: then the Court interposes on the foundation of justice, and on the principle, that, this new sort of limitation being introduced, it must be protected in all its consequences, because the limitation itself the law allows. Executory devises and springing uses existed not before the time of King Henry VIII. Then none of the rules at law concerning waste can be applied to them; and any man, having a fee subject to be defeated on a contingency, may, in point of law, pull down houses and cut down all the timber: no legal remedy, as action of waste or trover for the timber, lies, nor a prohibition; but in equity there is a remedy. In *Robinson v. Litton*,⁴ the inheritance being given over to the daughters on a contingency, your Lordship thought the intent was that the whole and every part of the inheritance should be preserved to wait that contingency, and that a bill may be brought for infant in ventre to stay waste, the statute of King William⁵ having declared him capable of taking—that is, preserved a contingent remainder to him; yet that infant has no legal remedy, nor after his birth can he bring trover. This Court then interposes, because the law does not. When the legal remedy about waste was established, no such thing was known in the law as a contingent remainder which might not be destroyed by the tenant for life and first owner of the inheritance. It was of no value at all: and then why should part be preserved?—which was the ground of the determination in *Udal v. Udal*,⁶ and 1 Rol. Ab. 119.⁷ This limitation, being for years, could not then exist at all, as there must be a freehold to support the contingent

¹ Cited 2 Freem. 55.

² *Saville's case*, Mos. 224; cited Ca. t. Talb. 16.

³ 10 & 11 Will. 3, c. 16

⁷ *Uvedale v. Uvedale*.

⁵ 1 Eq. Ab. 400.

⁶ 8 Atk. 209.

⁶ *Aleyn*, 81.

[*709] remainders; but it is now allowed *being introduced at the time of the troubles, about 1640, by Sir Geoffrey Palmer, who invented it for preservation of contingent remainders; but no legal remedy is adapted to it. The Court, then, will act on the same principles as in executory devises, which are very like this, being a limitation to arise on a contingency. Where, indeed, there are no trustees to preserve, &c., this Court would not grant an injunction to stay waste against tenant for life, and first owner of the inheritance, who, by the rule of law, may, notwithstanding the contingent remainders, do what they will with the whole estate, and then may with part of it; this Court not relieving against a general rule of law. But, now such trustees are allowed and approved of, they must execute this trust according to the different remedy the constitution allows, to preserve every part of it: so that, if tenant for life levies a fine, his particular estate is forfeited; they shall enter, but though they do not, their right of entry shall preserve all the contingent remainders. If he sells timber, there is no remedy at law; they must apply to this Court; and it is established, that, on an executory devise, this Court will interpose. But they are more emphatically entitled to this here; for the very purpose for which they have an estate for life is to preserve the contingent estate afterwards to arise, this Court considering it as an executory trust; so that, if they had brought a bill, both would have been prevented, because both were doing an injury—the owner of the inheritance, in cutting down before it was his day, as in *Lady Evelin's case*;¹ and it would be of very extensive consequence if a court of equity should not interpose, when there is no legal remedy adequate. A right without a remedy is a solecism; this Court finds one, as in case of infant in ventre, of executory devises, and where there are temporary impediments. If, on such a bill by the trustees, the Court would not restrain, the argument must be given up. None but the trustees could apply: for, though any one may file a bill in the name of an infant in ventre, considered as having existence in many cases, it is not so here; but the trustees, who have a [*710] *foundation to go upon, as having a remainder themselves prejudiced by this act, can alone apply.

If, then, the trustees, through ignorance or neglect, did not bring such bill, the *second* consideration arises, whether satisfaction ought not to be made now. Should this Court say, they only enjoin, there is no adequate remedy, for it might be then done by surprise. Lord Barnard was not only restrained, but obliged to make satisfaction and restore, on the principle that the Court would have prohibited him, and that complete justice could not otherwise be done. Where trees are cut down, specific satisfaction cannot be decreed; it then is only by way of compensation by damages. A bill to stay waste draws after it an account of the waste committed. If the injunction is disobeyed, an attachment

¹ Cited 2 Freem. 55.

would issue: the terms on which the Court would suffer the contempt to be cleared would be on paying costs of the contempt, and making satisfaction as far as could be; for the commitment is only a mean, and otherwise no one would value risking the contempt. It is a maxim, that neither infant nor person unborn can suffer by laches of a trustee, or of the person who ought to act; but the doctrine contended for would put their fate in the power of these trustees. If trustees join in destroying contingent remainder, it would take effect at law, but this Court would set it up again, and, if it got into the hands of a purchaser without notice, would make the tenant for life, and every one who joined, make satisfaction. If indeed the trees were blown down, or cut by wrong or trespass, without permission of the owner of the inheritance, the property would, ex necessitate, be the defendant's, as it cannot be in abeyance, and the severance was without default; there would be nothing of which this Court can lay hold of against his conscience. *Whitfield v. Bewit*, as in 2 P. Wms., 240, is no authority in the present case. On searching the register, it appears, indeed, that there were trustees; but the Court did not go on that: the objection was not taken, nor did the argument proceed on it. If no satisfaction can be obtained for this, timber may be destroyed *and mines opened on every estate, contrary to the intent of the makers of the settlement, and [*711] of every one entitled under it, except the first owner of the inheritance, who may destroy the whole, or work the mines barely on consent of a common farmer for life, by collusion with him, or ex vi if he does not agree; an action for the loppings and shade could be only brought by the tenant, which it would be worth while to pay on a wooded estate. There are few estates in England which are not let for years; and the first owner of the inheritance (although his remainder is very remote) may, by joining with such tenant, strip the estate, for *trespass* or *waste* cannot be brought against him. This argument, ab inconvenienti, is the strongest at law as well as equity. As, therefore, the law allows these contingent limitations to be made and preserved, and most lands in the kingdom are so settled, and the intent of the parties is to preserve the timber as well as the rest, and as there is no legal remedy, this Court will find one, which will not be adequate if satisfaction is not made after the act is done. This, therefore, is not a particular case, but a very general and universal one.

For the defendant was cited *Claxton v. Claxton*, 2 Vern. 152; *Aspinwall v. Leigh*, 2 Vern. 218; and that, if the parties were disabled from severing the timber, it might be kept too long on the estate, and rest in suspense for several years, to the detriment of the public.

LORD CHANCELLOR HARDWICKE took further time to consider of it; and Sir John Hind Cotton having died pending the suit, and

the cause revived against his representatives, his Lordship gave judgment, 5th February, 1753.

LORD CHANCELLOR HARDWICKE.¹—The end of the bill is, that defendant may account, and make satisfaction to the plaintiff, for all such sums of money as he hath received by a fall of timber upon the estate in question, in the year 1714, with interest.

[*712] *The case is this:—Richard Garth, Esq., being seized in fee, by will devised to Richard Bovey, father of the plaintiff, for ninety-nine years, if he should so long live *without impeachment of waste, voluntary waste excepted*, on condition he took upon himself the surname of Garth; and from and after the forfeiture or determination of that estate, *to the use of trustees during the life of the said Richard Bovey, in trust to preserve contingent estates*, but, nevertheless, to permit the said Richard Bovey, at and after his full age of twenty-one years, to receive the rents, issues, and profits thereof during his life, with remainder to his first and other sons in tail male. After this there are remainders to Avery Garth and his sons in like manner (all which determined soon after the testator's death), with the ultimate remainder to Sir John Hind Cotton, the defendant's grandfather, in fee simple.

Of this will the testator made Catherine, his wife, executrix.

On the 18th July, 1700, the testator died.

On his death the plaintiff's father entered upon the estate, and performed the condition of taking on himself the surname of Garth.

Sir John Hind Cotton, the defendant's grandfather, died, whereby the remainder in fee descended to the last Sir John Hind Cotton, his son and heir, and in whom the remainder of inheritance was become vested.

On the 12th February, 1713, the plaintiff's father executed a letter of attorney to Reginald Marriot, authorising him to come to an agreement with Sir John Hind Cotton, the remainder-man in fee, for a fall of timber on the estate.

On the 16th of July, 1714, articles were entered into between the plaintiff's father, by Mr. Marriot his attorney, on the one part, and Sir John Hind Cotton, the defendant's father, on the other part, reciting that the plaintiff's father was seised for life (which is not true, for his estate was only for ninety-nine years, determinable on his life), with remainder to all his sons in tail male, with remainder to Sir John Hind Cotton in fee; that the plain-

[*713] tiff's *father had then no issue male; that he had desired Sir John Hind Cotton to consent to the cutting down and selling part of the timber then standing and growing upon the premises.

Upon these recitals it is agreed that some person authorised by the plaintiff's father, and some person authorised by Sir John

¹ 1 Dick. 188. This case was copied from Lord Hardwicke's written argument.

Hind Cotton, should view, and mark what timber trees were then fit to be cut down; that then the parties should agree, and appoint by writing under their hands, how many of the trees so marked should be cut down, and sold for the best prices that could be got.

That Sir John Hind Cotton should not take any advantage of the cutting of the timber, nor should it be esteemed waste, nor any advantage taken thereof on pretence of its being waste.

The first trust of the money to arise by sale of the timber is, that it shall be applied to pay all such debts as were owing by the testator at his death, together with the legacies by him given, which have not been nor shall be paid out of the personal estate (although it is admitted, by the answer of the original defendant, Sir John Hind Cotton, the defendant's father, that the estate devised was not subject to the payment of the testator's debts); that the residue of the money arising by the sale of the timber should be divided into moieties between the plaintiff's father and the late Sir John Hind Cotton.

The articles then take notice, that there was a sum of 1787*l.* 5*s.* 6*d.* then in the hands of one of the Masters of this Court, being the produce of timber sold off the estate by Sir John Hind Cotton, the defendant's grandfather, which was claimed by both parties; and it is agreed that the money shall be paid out of Court, and applied to the same purposes as the money to arise by the timber then to be felled.

It is further agreed that the death of the plaintiff's father without issue male, or, his having issue male, on the death of Sir John Hind Cotton, should make no alteration in the terms thereby agreed on; but that the *parties, their executors or administrators, should, notwithstanding any death or [714] alteration, have the like share and benefit of the wood and timber to be felled and cut down as if all such wood and timber had been felled and cut down, and the money divided and paid between the plaintiff's father and Sir John Hind Cotton, before such death or alteration.

Then follows a clause for applying the testator's personal estate, in the first place to the payment of his debts and legacies.

Sir John Hind Cotton, the original defendant, admits, by his first answer (which is not replied to), that he received about the sum of 1000*l.* for his share of the money for which the timber was sold.

At the time of entering into these articles, and when the timber was felled and disposed of, *the plaintiff was not born*, but his father was then married to Mary Pullen, his first wife; and it is sworn by the first answer, that he had been married to her for several years without having any issue, and was not then likely to have any by her.

In September, 1716, she died without ever having had any issue; and sometime after, the plaintiff's father intermarried with Elizabeth Emmerson.

On the 26th of May, 1724, the plaintiff was born, which was about ten years after entering into the articles.

On the 11th of January, 1727, the plaintiff's father died, leaving the plaintiff, his only son, an infant, who then became entitled to the estate as tenant in tail in possession.

On the 26th of May, 1745, the plaintiff attained his age of twenty-one years, and in Trinity term following suffered a recovery of the estate to the use of himself and his heirs.

On the 20th of May, 1748, the original bill was brought by the plaintiff against Sir John Hind Cotton, who dying before a determination, the suit hath been revived against the defendants, his executors, and the same relief is prayed out of his assets, and assets are admitted.

Upon this case the general question is, whether the [*715] plaintiff is entitled to satisfaction for so much as Sir John Hind Cotton, the father received out of the inheritance by the fall and sale of timber, before the plaintiff came in esse, and consequently before he had any estate in him in the land, and whilst the remainder, which vested in him afterwards, rested in mere contingency or possibility.

This hath been admitted at the Bar, on all sides, to be entirely a new question, upon which there is no precedent, and which hath never been brought into judgment before.

It hath been admitted, also, that the plaintiff can have no remedy at law, either in his own name or in the names of the trustees to preserve contingent remainders, but that his only possible remedy is in a court of equity.

This made it necessary for the Court to proceed with great deliberation before a decision was made, which would be the first precedent after the invention of trustees to preserve contingent remainders, now about a hundred years since, and which may have extensive consequences as to other cases that may arise.

In order to determine whether the plaintiff is entitled to the relief he prays, it will be necessary to take several matters into consideration—to lay down some that are plain, and to clear and establish others that appear more doubtful.

First, that the stripping of this estate of the timber was a wrongful act is clear from the nature of the limitations.

The plaintiff's father was only tenant for years, punishable for wilful waste, and had no present right to or interest in the timber, other than the mast, and shade, and necessary botes.

The defendant's father had no *present* right to cut it down, but in his turn, according to the order of limitation. It is true, the inheritance was vested in him, subject to open and let in the contingent remainder, when a son should come in esse; and in that quality the timber part of the inheritance was vested in him, but he had no present right to take and use it. The trustees, who

[*716] were **seised* of the freehold, might have restrained him in this court by injunction, and the plaintiff might have

brought an action of trespass against him for his entry and tortious act.

Further, it was the duty of the plaintiff's father so to have done, not only in respect of the trespass upon himself, which he might have waived, but in respect of the privity which was in expectancy between the tenant for years and the contingent remainder-man, when he should come in esse; for between the tenant for years and the lessor, or the remainder-man of the inheritance, there is a privity; and before the statute of quia emptores terrarum a tenure arose: and this makes a tenant for years a kind of fiduciary for the lessor, or the remainder-man, who stands in his place.

As this act was wrongful, both in Mr. Garth, the plaintiff's father, and the late Sir John Hind Cotton, so this wrong was committed collusively between them: when I say collusively, I do not mean an injurious intention, for they might mistake their right; but that will not vary the case in respect of the right of others. This appears by the whole frame of the articles, which are an agreement to do what neither of them alone, nor both together, had a right to do. In order to this, the plaintiff's father is recited to have the freehold, which he had not. A colour is given to the transaction, as if it were for payment of the debts of the father, to which it is admitted the estate was not liable; and it is expressly stipulated, that, even in case the plaintiff's father should die, leaving issue male, before all the timber should be felled and the money divided, the parties to these articles, (i. e. the tenant for years, and the remote remainder-man,) should have the same shares as if all the timber had been felled and the money divided before such death or alteration had happened.

Can there be a stronger proof of collusion than this? The tenant for years enters into an agreement, not only contrary to his general privity and trust (if I may so speak), but both the parties bind themselves in plain *terms to injure the remainder-man, even after his estate should become vested, if that event should happen before this destruction was completed. [*717]

The next thing which is plain and self-evident is, that this wrongful collusive transaction hath turned to the damage and loss of the plaintiff.

The next inquiry is, whether the plaintiff is entitled to any remedy in this court upon the principles of equity.

At law, it is admitted, as I said before, that he can have none; and it must be admitted further, that, if the limitation to trustees to preserve contingent remainders had been out of the case, he would have had none in equity.

Indeed, as the plaintiff's father was made only tenant for years, if there had not been such a limitation to the trustees, all the contingent remainders would have been void, for want of an estate of freehold to support them; and Sir John Hind Cotton would have had the immediate freehold as well as the inheritance in him, which would have given him a clear right. But if the plaintiff's father had been tenant for life, and there had been no

such limitation to the trustees, the plaintiff could even then have been entitled to no remedy, because his whole use in the land, whilst it remained in contingency, would have been in the power of the tenant for life to bar by fine, feoffment, or surrender to the remainder-man vested; and there could have been no pretence for this Court to interpose to preserve or restore to him part of that inheritance, the whole of which was in the power of the tenant for life.

Therefore, the stress and foundation of the *plaintiff's equity depends entirely upon the estate limited to the trustees to preserve the contingent uses*, and the consequences from thence.

In order to determine concerning the force and operation of this in the present case, I will consider—

First, what is the intention and use of creating limitations to trustees for preserving contingent remainders.

Secondly, what estate such trustees take in point of law, and [*718] what actions they may maintain at common law.

**Thirdly*, what is the nature and extent of this trust in equity, and what remedy they may pursue in this Court.

Fourthly, how far, and in what cases, such trustees may be charged in equity for a breach of trust, or any other person be affected by their acts, or laches, in breach of their trust.

First, the intention of limitation to trustees to preserve contingent uses took its rise from the determination of two great cases, reported by Lord Coke, in his first volume—*Chudleigh's case*,¹ Hil., 31 Eliz., and *Archer's case*,² Mich., 39 Eliz.; though it was several years after those resolutions before that light was struck out and it was not brought into practice amongst conveyancers till the time of the usurpation, when, probably, the providing against forfeitures for what was then called treason and delinquency was an additional motive to it.

Let us see, then, what were the claims and defects which wanted to be filled up and remedied in consequence of those two judgments.

The grand dispute in *Chudleigh's case* was concerning the power of feoffees to uses created since the stat. 27 Hen. 8, c. 10, to destroy contingent uses by fine or feoffment before the contingent use came into being.

In order to determine this, the judges entered into very refined and speculative reasonings, some of which (I speak it with reverence) are not very easy to comprehend.

They all agreed, that where there is a conveyance to uses, to the use of the father for life, remainder to his first and every other son in tail, with remainders over—in all those cases no estate at all is left in the feoffees, but the whole estate is divested and drawn out of them by the Statute of Uses.

But then came the question respecting the contingent uses to the sons not in esse. On the one side, though they admitted there

¹ 1 Co. 120, Poph. 70, and 1 And. 309, where it is best reported.

² 1 Co. 63.

was no estate left in the feoffees, yet they said there was a *scintilla juris*, a power of entry to preserve the contingent uses, if, by reason of disseisin or disturbance of the estate, there should be occasion; for, say they, no use can be executed by the statute unless *there be a person seised to the use, and also a cestui que use. And, if any disseisin or disturbance of the estate [719] should happen, the right to the use cannot be executed within the statute: therefore, lest these contingent uses should be destroyed and not executed, there must, by construction of the statute, be such a power of entry left in the feoffees and their heirs.

This was the opinion of the greatest part of the judges.

Others of the judges were of opinion that there was not only no estate left in the feoffees, but no power or right to enter, nor anything to do with the land; but that they were at first only conduit-pipes, and the estate that was in them was by the statute wholly transferred to serve the uses which were in esse, with a pregnancy and prospect to the contingent remainders, if they should arise in their due time.

It must be observed, that one thing which weighed much with the majority of the judges, to be of opinion for leaving a right of entry in the feoffees to preserve the contingent uses, was their fear of perpetuities, and of having contingent estates by way of use in persons not in esse, if they should not be destroyable by the feoffees; for this doctrine, as it left it in the power of the feoffees to preserve the contingent uses, so it put it into their power to destroy them, if they pleased.

The reason of which was, that at that time the law was not settled that the destruction of the particular estate by the feoffment or conveyance of the cestui que use for life, before the contingent remainders became vested, was a destruction of the contingent remainders: but afterward came *Archer's case*, in which case this point was solemnly settled, and they were relieved from their apprehensions; for, though *Archer's case* is placed in the reports before *Chudleigh's case*, it was not determined until some years afterwards.

The clearest summary of the reasoning in those cases is stated by Mr. Pollexfen, in his argument of the case of *Hales v. Risley*, in Pollexfen, 385, from whence I have taken it.

*From this deduction you will see what were the [720] chasms and defects to be supplied.

Here was, then, understood to be a power in the general feoffees to uses, either to preserve or destroy those uses ad libitum, and here was a power in the cestui que use for life to destroy them.

How were those defects to be supplied and filled up? By vesting a limitation in certain trustees eo nomine, upon an express trust to support them. But how to support them? By preserving the whole inheritance to come entire to the cestui que use in contingency, in like manner as trustees to uses ought to do before the Statute of Uses, when they were but trusts to be executed in

this court. And, as things then stood, such trustees, having the whole legal estate, might and ought to preserve the entire inheritance, whether consisting of the lands, mines, or timber, for the benefit of all the cestui que trusts in remainder, either vested or contingent.

Secondly. Consider in the next place, what such trustees take in point of law, and what actions they may maintain at common law.

It hath formerly been attempted to be brought in question, whether, upon such a limitation to trustees, after a prior limitation for life, they took any estate at all in the land, or only a right of entry on the forfeiture or surrender of the first tenant for life, by reason that the limitation, being only during his life, could not commence or take effect after his death.

But this was soon settled on the authority of *Cholmondeley's case*, 2 Co. 50, a., where it was held, that, if there is a lease to A. for life, remainder to another during the life of A., this is a good remainder; for by possibility the remainder may take effect in case a tenant for life makes a feoffment in fee, or commits any other forfeiture; and so in the book, 41 Edw. 3 Fitzh. tit. "Waste," 83; and this is followed by the late case of *Duncomb v. Duncomb*, Hil., 7 Will. 3 C. B., 3 Lev. 487, which was one of the [*721] first cases wherein the operation of such *limitation to trustees to preserve contingent uses came into question.

If this be so upon such a limitation, after a prior estate for life, it holds much more strongly when limited after a prior estate for years only, determinable on the life of the first tenant: because in the last case it comes the first estate of freehold, to the trustees, as was rightly reasoned by Lord Chief Justice Lee, in the case of *Smith v. Dormer*, and *Packhurst*, Mich., 14 Geo. 2, B. R.¹

It is plain, therefore, that these trustees had the immediate freehold in them—an estate pour autrui; and at law they alone could maintain or defend any action concerning the freehold.

If a disseisin was committed they must bring the assize, and they must defend in all præcipes; for the possession of the tenant for years was, in law, their possession; for this reason they had in law an interest in the timber, not, indeed, to cut down or destroy, but in respect of the enjoyment by their tenant for years, and of the expectancy of its coming into their actual possession, by the determination of his estate, as part of their freehold.

Notwithstanding all this, it is certain that they could maintain no action of waste; the reason of which is, that the common law gave the prohibition of waste only to an owner of the inheritance, and the Statute of Gloucester gave the writ of waste to the same persons. But in this respect such trustees are in no other condition than all other remainder-men for life.

¹ 8 Vin. Ab. 418; Willes' Rep. 327; 3 Atk. 133; 6 Bro. P. C. 351, Toml. ed.

Thirdly. Consider, in the next place, what is the nature and extent of their trust in equity, and what remedies they may pursue in this Court.

And I hold it to be agreeable to natural justice, and in support of right, to construe their trust in the most liberal manner. In the case of *Mansell v. Mansell*,¹ (which must be more particularly mentioned by and by), it was expressly laid down by Lord Raymond, as I took it from his own mouth—"It is only positive law that tenant for life may destroy contingent remainders, and therefore it was a very considerable invention to create these trusts to *preserve them; they are the creatures of the Court, and [*722] properly under its direction and control."

The first trust is declared to preserve the contingent estates thereafter limited. How to preserve them? To preserve the inheritance as entire as possible—to go according to the succession established by the testator, which inheritance consists of the land, timber, and mines, and cannot be preserved entire without preserving all three. In many estates the timber is the most valuable part—in more, the mines; and the destruction of the one, or the exhausting of the other, might take away, or be an alienation of, the best part of the inheritance.

But it hath been objected, that this relates only to the preservation of the legal estate of the use, and not to the timber or mines, because the estate of the trustees cannot support an action of waste.

This might, in many instances, be to preserve the shell without the kernel, and brings it to the question, what remedies they may, in virtue of this trust, pursue in this Court.

These trusts are equally declared to make entries and bring actions, as the case shall require. Here it is expressly to do all and every such lawful act and acts, by entry or otherwise, as shall be requisite for that purpose and end.

But whether the expression be the one or the other, it comes to the same thing, and comprehends all remedies both in law and equity.

For the course of equity is a part of the constitution of the law and judicial proceedings in this kingdom. Therefore, if after a forfeiture committed, and an entry made for that forfeiture, such trustees wanted any assistance of a Court of equity in support of their trust, and not to break in upon the right of the tenant for life to receive the rents and profits, they might undoubtedly, by force of this trust, have their remedy here. As they may do this, I am clearly of opinion, that they may bring a bill for an injunction to stay waste, although no precedent in point is produced for it.

*In the present case they were remainder-men pour [723] autre vie, and immediately owners of the freehold in law. In the case of *Dayrell v. Champness*, 1 Eq. Ca. Ab. 400, Trin.,

¹ 2 P. Wms. 678; Ca. t. Talb. 252.

1700, a remainder-man for life was admitted to maintain such a bill without making the owner of the inheritance a party; and although it was observed upon that case by Mr. Clarke, that it appears by the state of it in the book that the plaintiff had the first remainder in tail vested, yet that doth not appear by the recitals of this decretal order; and if it had, the objection could not have been made.

If the trustees could do this as remainder-men of the legal estate pour autre vie, surely their trust, which affects their conscience, and, according to Lord Raymond's opinion, makes them creatures of this Court, would not make their case the weaker here.

But the books go further, and say a bill may be brought for an injunction to stay waste on behalf of an infant en ventre sa mère.¹ And so is *Musgrave v. Parry*, 2 Vern. 710; which is liable to much more difficulty, for that must be as amicus curiæ on the unborn child's behalf.

I, therefore, hold most clearly, that the trustees might have brought such a bill, and obtained an injunction to stay this waste, both against the plaintiff's father and the late Sir John Hind Cotton.

Pursue this, then, into its necessary consequences.

Suppose, after such an injunction granted, the timber had been felled: this had been a contempt of the Court, and the contemnor must have stood committed.

Then arises the question which Mr. *Solicitor General*² very properly put in his argument—on what terms should they be discharged? This Court could not have fined them: therefore, certainly, only on the terms of making satisfaction. That satisfaction could not have been made by setting up the trees again, and therefore it must have been by paying the value. Who must have had that value? Not the tenant for years, for he had no [*724] pretence to it; nor the remote remainder-man in fee, for *he had no right to take it: and this would have been to reward them both for their contempt and collusion. The consequence is, it must have been laid up, and secured to attend the contingent uses. Without this, justice could not have been done.

Fourthly. It comes next to be considered, how far and in what cases such trustees may be charged in equity for a breach of trust, or any other person may be affected by their act, or laches, in breach of trust.

Notwithstanding the saying of Mr. Pollexfen, arguendo at the bar (Pollex. 250), "that trustees to preserve contingent remainders were never punished in equity when they broke their trust" (which, by the way, is a kind of contradiction in terms), that is now exploded, and settled to the satisfaction of mankind to be otherwise.

It was first broken in upon by Lord Harcourt, in the case of

¹ See Lutterell's case, cited Prec. Ch. 50; *Scatterwood v. Edge*, 1 Salk. 229.

² Murray, afterwards Lord Mansfield.

Pye v. Gorges,¹ Mich., 1710, where he declared, that "when such trustees were appointed, whether by marriage settlement or will, and they, before the birth of a son, joined in a conveyance to destroy the contingent remainders, this was a plain breach of trust, and the persons taking under such a conveyance, if voluntary, or having notice, should be liable to the same trusts:" and he said, if there was no precedent in the case, he would make one.

Then came *Tipping v. Pigot*,² in Mich., 1711, before the same Lord Chancellor, and he adhered to the same doctrine, and said it would be dangerous for such trustees themselves to make the experiment. Thus it stood till the great case of *Mansell v. Mansell*, which was first decreed by Sir Joseph Jekyll, at the Rolls, in January, 1731, and afterwards by Lord King, assisted by Lord Raymond and Lord Chief Baron Reynolds, Dec. 12, 1732.³

Here it was first solemnly settled, by the concurrent opinion of all those great men, that the trustees themselves shall be liable in equity to make satisfaction for such a breach of trust; and also, that a voluntary alienee, or a purchaser for a valuable consideration, with notice of the trust shall be decreed in equity to restore the estate; and in that case it was decreed accordingly. [*725]

Thus it stands determined, that for a breach of trust in aliening the inheritance the trustees are liable, and other persons are affected by their act done in breach of this trust.

On this I build: suppose these trustees had consented to the felling and sale of the timber—had joined with Mr. Garth and Sir John Hind Cotton in the articles, and expressly covenanted that they would bring no bill for an injunction—would the trustees in that case have been liable? Clearly so; for it was agreeing to alien part of the inheritance; and it plainly shows from the principle on which the Court founded itself in *Mansell v. Mansell*. Lord Raymond said, "It was strange in natural reason to say, that, where a man hath created a trust to preserve his estate, the trustees may break that trust, and give away the estate with impunity; and that there wanted no particular precedent for it, because it is founded on all the general rules of trust."

If the trustees had joined in the articles thus to break their trust, would Mr. Garth, the father, or the late Sir John Hind Cotton, have been affected by this express act, done in breach of their trust? This, to me, is also as clear; for then they would have had notice of this breach of trust, and have reaped the benefits of it; which is expressly within the rules of *Mansell v. Mansell*. And here I cannot help repeating some remarkable words of Lord King, who was not disposed to amplify the jurisdiction of this Court. "If it is," said his Lordship, "a breach of trust, and the trustees convey the estate over, a Court of equity is not to sit still and let others profit by the spoil."

¹ Prec. Ch. 308; 1 P. Wms. 128; 2 Salk. 680; 7 Bro. P. C. 221, Toml. ed.

² 1 Eq. Ca. Ab. 385; Gilb. Eq. Rep. 34.

³ 2 P. Wms. 678; Ca. t. Talb. 252; 2 Eq. Ca. Ab. 747.

This position is very apposite to the present case; all the difference is, that here is no positive act of the trustees, but only laches or neglect in not performing their trust, and bringing a bill for an injunction to stop this waste.

This may excuse the trustees, if they had no notice of the scheme or attempt to strip the estate of the timber; *but [*726] how will it excuse the others, who, as Lord King expressed it, have profited by the spoil? By no means.

In all cases of alienation the alienees are not affected merely by act of the trustees, but by notice of the trust: and here all parties had actual notice of the will, claim under it, and have expressly recited it in their articles. Therefore, in this case the actual notice of the trust operates to make the laches of the trustees affect them as much as their express act would have done in the other: and it would be strange to say that the plaintiff's and defendant's father would have been liable for the timber if the trustees had concurred in the destruction and sale of it, but shall be in a better condition because they did not. What is the justice that results from hence, but restitution? Just as in the case of an alienation with notice, the justice would have been a re-conveyance: indeed, it plainly follows by analogy from thence. Suppose an estate with valuable mines in it, unopened, settled in this manner, and the trustees to preserve contingent remainders had joined in an alienation, with notice. Afterwards such a purchaser, with notice, opens the mines, and exhausts them, putting a great sum of money into his pocket. Then a son is born, who is tenant in tail: the tenant for life dies, and the son brings a bill for a re-conveyance: if, according to the authority of *Mansell v. Mansell*, the Court had decreed a re conveyance, would the justice have been complete without decreeing satisfaction for so much of the inheritance as was carried off by exhausting the mines? Clearly not. It would be a necessary, unavoidable consequence of equity, that satisfaction must be made to the owner of the inheritance. And yet this is liable to the same objections as have been made in the present case at the Bar. It was done at a time when the contingent remainder-man had neither jus in re nor jus ad rem, before he was in rerum naturâ; and no wrong can be done to a person non existent. But these are colourable objections only: for, if equity ought to wait, and expect the vesting of [*727] the estate for his *benefit, and restore him that estate, it ought to do it completely.

I have chosen to go through the general reasoning (which hath, upon the maturest consideration, convinced me that the plaintiff ought to be relieved in this Court), before I state the objections made on the part of the defendant, the rather because the clearest answer to these objections will arise from the right application of that reasoning.

First objection.—That the interposition and allowance of trustees to preserve contingent remainders was not intended, nor has been suffered, to alter the legal rights of the tenants for life and the

first remainder-man of the inheritance vested, either in respect of the timber or other property of, or powers over, the estate.

Answer.—This objection assumes too much; for I have already proved, and it is demonstrable, that the very intention of interposing this new-invented limitation was to alter and abridge the legal rights both of the tenant for life and the first remainder-man vested, to abridge the legal right of the former to defeat and destroy the contingent use of the inheritance whilst it remains contingent and eventual, to abridge the legal right of the latter, to destroy it by accepting a surrender of the estate for life: all which are as much legal powers as the cutting down of timber or the opening or digging of mines.

I admit the instance which was put, that if (where there is tenant for life or for years, subject to waste) timber is blown down by accident, or cut down by the tort of a stranger or of the tenant for life alone, the owner of the first remainder of inheritance vested shall have the benefit of it. So was the case of the timber blown down on the late Duke of Newcastle's estate, and the case of *Whitfield v. Bewit*, 2 P. Wms. 240;¹ but the ascertaining of the ground of these resolutions is sufficient to distinguish them from the present case.

The common law doth not, nor can, consider the contingent uses as having existence till they happen: therefore, according to *Levis Bowel's case*, 11 Co. 79, and *Udal v. *Udal*, Aleyn, [*728] 81, an estate in contingency is as no estate till the contingency happens. And when the trees are severed the property must vest immediately in somebody, and that can only be in the first remainder-man of inheritance vested; and on the foundation of that property he may maintain trover for them.

This is his right at law; and there is in the cases put of trees fallen by accident, or merely by the wrongful act of a stranger or of the tenant for life, no ground of equity to take it from him.

But here comes in the force and operation of *the collusion* in this case. The destruction being made *by contrivance and collusion with the remainder-man, and affecting his conscience*, obliges this Court to pursue its known maxims in laying hold of it either by restraining the act before it be completed, or decreeing satisfaction for it afterwards: for, *in all cases where a legal right is acquired or exercised by fraud or collusion, contrary to conscience, it is the office of this Court to enjoin it, or decree a compensation.*

Second objection.—That the relief sought by the bill is contrary to all the rules of law, which allows no remedy for waste to any person who hath not an immediate reversion or remainder of inheritance vested at the time of the waste committed.

Answer.—This is true in general, though it admits of some exceptions even at common law. But, if it were true at common law in the latitude with which it was laid down, it would not govern this case, which depends *upon principles of equity arising*

¹ 2 Eq. Ca. Ab. 589.

from the collusion and covin between the tenant for years and the remote remainder-man, which is an established ground of relief in this Court, even beyond, and sometimes contrary to, the rules of law.

However, as I always incline to adhere, as near as justice will admit, to the rule *equitas sequitur legem*, I will endeavor to show how far the opinion I have given coincides with, and is supported by, the reason of some cases concerning waste.

[*729] *It is clear, that when there is a tenant for life,¹ with remainder over in fee or tail, and tenant for life commits waste, the remainder-man in fee, or in tail, can have no action of waste. The reason is, because the plaintiff in the action must recover the place wasted, and that would be an injustice to the remainder for life, which is not forfeited; and, if it should be recovered by the owner of the inheritance (being under a limitation of the party) it would never go back again.

But, notwithstanding that, he may have another action of trover for the trees, and therein recover satisfaction for the wrong done to the inheritance; nay, in case the remainder-man for life dies, leaving the remainder-man of the inheritance, he may then bring an action of waste for the waste done during the continuance of the remainder for life.

Further, if there be a tenant for life, with an immediate remainder, or reversion in fee, and the remainder-man, or reversioner in fee, grants over his remainder, or reversion, to A. for the life of A.; then the tenant for life commits waste, and afterwards, the grantor of the remainder, or reversion for life, dies, this remainder-man, or reversioner in fee, may maintain an action of waste, though he had parted with his remainder, or reversion for that time, by his own voluntary act.

All this appears by *Paget's case*, 5 Co. 76, b., and the case of *Udal v. Udul*; and I shall make a further use of it by and by.

But such is the abhorrence of the common law to waste and destruction, that it hath extended its remedies, in some special cases, beyond the strict principles on which they were originally founded; and, therefore, though it be requisite in general, that the inheritance should be vested in the plaintiff at the time of the waste done, else he cannot lay it to his disherison; yet, if the estate were out of him by wrong, and then come into him again, he shall maintain the action of waste. Thus, if lessee for life make a feoffment in fee upon condition, the feoffee does waste, and afterwards breaks the condition, and the *lessee for [*730] life enters for the breach, though the reversioner had nothing in the reversion at the time of the waste done: yet, as it was out of him by tort, when it is revested, he shall have this remedy. Co. Litt. 356, a.

But there is another case at law, the reason of which seems to me to be more analogous to the present case; as that of a bishop,

¹ [With remainder to another tenant for life]. Evidently omitted.

after the restitution of temporalities to him and his successors, in right of his church. When he dies, during the vacancy the right is in the king; and when a new bishop is invested with the temporalities, the fee is in him. Suppose, then, a tenant for life, or for years, by demise of the predecessor, commits waste during the vacancy, the successor shall have the action for this waste, though he had nothing at all in the land at the time the waste was done. Co. Litt. 356; Fitzh. N. B. 112.

I shall be told, perhaps, that that is by particular statute, and therefore is no proof of the reason of the common law; and that the Statute of Marlebridge, Cap. 29, against depredations upon the possessions of ecclesiastical persons, gave this remedy; and for this some countenance may be drawn from what Fitzherbert says, in the place cited.

But I beg leave to deny this to be law, and to hold, that that statute doth not include bishops or their possessions; and of this opinion is Lord Coke, in his reading on the Statute of Marlebridge, 2 Inst. 151. His words are, "This Act extendeth only to abbots, priors, and other prelates, that be religious and regular, and not to bishops and other ecclesiastical persons, being secular; for in the second clause of this Act, *hujus modi religiosorum* is mentioned for the distinction between religious and secular; and the reason of this diversity is, that the abbots and priors, and other religious persons, are dead persons in law, and have capacity to have lands and goods only for the use and benefit of the house, and cannot make any testament; and therefore, the church, or religious house, is holden always one; in respect whereof, the succeeding abbot shall have an assize for disseisin done in the lifetime of his predecessor, and an action of waste *for [*731] waste done in his predecessor's time; but so shall not a bishop, dean, archdeacon, or the like, who are ecclesiastical persons secular, because the church, by their death, hath an alteration, and is not always one.

That the opinion of Lord Coke was, that the action is not founded on the Statute of Marlebridge, is clear by other cases; for if bishops were within the statute, then they as well as abbots might have an action of waste for waste done, not in time of vacancy, but in their predecessor's time, which, as to ecclesiastical persons regular, is clearly within the statute; but it hath been settled that they cannot: 39 Edw. 3, 15; 2 Hen. 4, 2; 2 Roll. Abr. 8, 24; Pla. 3, 4, 5, 6, 7. From hence I infer, that this remedy was given, not by particular statute, but by the policy of the law, which would not permit an estate, which it allowed to be created, and whilst it was in *gremio legis*, as it were, to be destroyed or stript without giving a remedy to punish it, though by an extension of its common principles.

But still I must resort back to this, that if there was not so much countenance from the reason of some cases at the common law for this opinion, yet that would not govern this case, which depends on principles of equity; and equity hath always gone

further to restrain waste and destruction than the common law hath done.

Therefore, in the case already put, of an intermediate remainder for life, though the law allows no action of waste, this Court sustains a bill for an injunction, and this *ab antiquo*, according to the case in Moore, 554; where Lord Ellesmere says, he had seen a precedent for it so long ago as in the reign of Richard II., 1 Roll. Abr. 377; 1 Vern. 23,¹ and many cases in practice.

And although the tenant in tail, after possibility of issue extinct, is at law punishable for waste by reason of the inheritance, which was once in him, yet Lord Chancellor Nottingham was clearly of opinion, to grant an injunction to restrain a tenant in tail from committing waste in timber, which grew for the ornament of a mansion-house: *Abrahall v. Bubb*, 2 Freem. 53; 2 Sho. 69.² In the same book there is the like case, before [*732] *Sir John Trevor, M. R., 2 Freem. 278, Hil. 1704; and this hath been followed since, by several cases of tenant for life *without impeachment of waste generally*, who have attempted to pull down a mansion-house, or to cut down timber growing for shelter or ornament of the mansion-house.

But this Court hath gone still further; and in the case of *Abrahall v. Bubb*, Lord Nottingham cites the case of a Lady Evelin, where there was tenant for life, remainder to the first son for life without impeachment of waste, with remainders over; and the first son, by leave of the lessee of the tenant for life, came upon the land and felled timber, which was not under the description of trees growing for shelter or ornament; and this Court granted an injunction against him, though no action whatsoever could be maintained at law: and upon the same ground, I did the like in the case of *Fleming* against the late *Bishop of Carlisle and others*. There the bishop was tenant for life, remainder to his eldest son for life, *without impeachment of waste*, with remainder over in fee; the eldest son, by permission of the bishop, entered and began to cut down the timber, and the reversioner in fee brought a bill for an injunction, and I granted it, because he was not to be allowed to exercise his power of doing waste by anticipation, and before the estate to which this privilege was annexed came into possession; and this in reason comes near to the case of the late Sir John Hind Cotton's bringing himself, by collusion, into possession of the timber before his time.

The case of *Robinson v. Litton*³ went still further than the common law: that cause was heard in this Court, the 12th December, 1744. There was a devise to the defendant and his heirs; and if he should die before the age of twenty-one years, leaving no issue, then to the testator's first, &c., daughter in tail, remainder to the testator's own right heirs; but if the defendant should live to attain the age of twenty-one years, then the estate should be sold, and the money be applied for the benefit of the testator's

¹ *Tracy v. Tracy*.

² 3 Atk. 209; 2 Eq. Ca. Ab. 528.

³ *S. C.*, 2 Eq. Ca. Ab. 757.

daughters. The defendant, being under the age *of [733] twenty-one years, began to commit waste, and the daughters brought their bill in this case; and though the defendant had the inheritance in him in point of law at the time, yet by reason of the contingent executory limitation, the Court granted an injunction, and at the hearing of the cause, after its being fully argued, made that injunction perpetual.

Third objection.—That, suppose a bill might have been maintained by the trustees to support the contingent remainders, to stay this waste before it was committed, yet it will not follow from thence, that after that is over, a bill may now be brought for an account, and that the jurisdiction of this Court to decree an account of the value of the timber, is only incident and concomitant to the jurisdiction of granting an injunction.

Answer.—It is true that the general run of the cases is of bills for an injunction, because that is a preventive suit, and the most remedial to the party; but that affords no conclusive argument that a bill for such an account cannot be maintained without praying an injunction.

In support of this notion, only one case was cited—*Jesus College v. Bloomer*,¹ which was before me November 13th, 1745. The lessee of the college had, during his lease, cut down some trees, and taken away some stones and materials of the premises, and converted them to his own use; the term was expired, and a new lease granted to a stranger, and the college brought their bill for an account and satisfaction of the waste. At the hearing of the cause, I doubted (amongst other things) whether such a bill in equity was maintainable, without praying an injunction to stay the waste, and it stood over to another day, to produce precedents; none were produced, and the bill was dismissed, without costs; but the point was not absolutely determined, nor was that the only ground of the dismissal: but I was of opinion, that, at the utmost, it was in the discretion of the Court, and if the college had a right, they might clearly bring an action of trover at common law; and it being a matter of small value, I did not think fit to countenance such bills in this Court, *after [734] the lease expired. This is widely different from the present case in all its circumstances, and particularly that it is admitted, that *the plaintiff here, though greatly damaged, can have no remedy at law*, which is a substantial difference.

Fourth objection.—But it was objected further, that if such a bill for an account, not incident to an injunction, can be maintained, yet there is no precedent of decreeing the value of the timber to be secured and laid out in land for the benefit of the contingent remainder-man; and this could not be done, even upon a bill by trustees to preserve contingent remainders before

¹ 3 Atk. 262; Amb. 54, where the reports of the case differ from the account of it given here by Lord Hardwicke, and the bill was, it seems, dismissed with costs.

the waste completed; and for this the case of *Whitfield v. Bewit*¹ was relied on.

Answer.—This objection hath been already answered in the course of my argument, and to that I will refer without repeating it. The sound distinction between this case and that of *Whitfield v. Bewit* is, *the conclusion and covin between the tenant for years and the remote remainder-man in fee*; whereas, in that case, the remainder-man in fee was entirely innocent, and had done nothing contrary to conscience to come at his legal property in the timber when severed: but it was solely the tortious act of the tenant for life; and I think I have proved that in some cases of destruction of contingent remainders, or alienations of part of the inheritance, to the prejudice of the contingent remainder-man, such an account and compensation must be decreed, in order to attain adequate justice.

On this I rely for an answer to that objection.

Fifth objection.—That the demand is made after a great length of time, and that ought to be allowed as a bar in this Court.

Answer.—But though there is length of time in the case, no statute of limitations stands in the way, nor is there any laches to be imputed to the plaintiff.

It is true the articles were entered into in 1714, and the timber was felled soon after; but the plaintiff was not born till May, 1724; his father lived till 1727, and *he did not attain his age of twenty-one years till May, 1745; and this bill was brought in May, 1748, within three years after his coming of age.

As to the inconvenience objected to arise from this length of time, how is that inconvenience greater than the common law's allowing an action of waste to be brought by a remainder-man in fee, after the death of a mesne remainder-man for life, for waste done in his lifetime? That life may have lasted forty, fifty, or sixty years afterwards, and yet this the law allows. Besides, in this case the plaintiff submits to accept the value on the foot of the defendant's answer, which avoids the difficulty of an account.

Sixth objection.—Another objection hath occurred to me in considering this case, which was not mentioned at the bar, and that is, that by suffering a recovery in 1745, the plaintiff hath altered the state of the remainder, which was in him by the will, and gained a new use; that this might have been a bar to a proper action of waste at law, for waste done precedent; and, by parity of reason, ought to take away his remedy in this Court.

Answer.—This objection, though it may strike at first, yet receives a clear answer.

I admit that in Co. Litt. 53, b., Lord Coke lays it down, that, after waste done, there is a special regard to be had to the continuance

of the reversion in the same state that it was at the time of the waste done, for, if after the waste done the reversioner granteth it over, though he taketh back the whole estate, yet is the waste dispunishable. So, if A. grant the reversion to the use of himself and his wife, and of his heirs, yet the waste is dispunishable; and so of the like, because the estate of the reversion continueth not, but is altered: and consequently, the action of waste, for waste done before, which consists in privity, is gone.

This is undoubtedly law; but the difference is, here is no use or new estate created. The use of this recovery is declared only to the plaintiff himself and his heirs, whereby his estate tail is turned into an estate in fee, *which, in Lord Derwent-water's case, before the judges and delegates, Hil., 6 Geo. [*736] 1, was solemnly determined to be the same use, and the same fee, only delivered from the fetters and restraint laid upon it by the Statute de Donis; and this was agreeable to the resolution of the case of *Abbot v. Burton*, 2 Salk. 590,¹ Trin., 7 Anne, C. B., and to the case of *Martin ex dem. Tregonwell v. Strachan*, adjudged in B. R. Hil., 16 Geo 2, and affirmed in the House of Lords in February, 1743.²

But I go further still, and hold that even in cases where the state of the reversion would be so altered by the act of the reversioner as to preclude his proper action of waste, yet still his property, in the timber severed before, would remain, and he might maintain trover for it, which is sufficient to take off the force of this objection as applied to the present case.

Seventh objection.—I shall mention but one objection more, and that arises recently from the present state of the cause, as it comes before the Court upon a bill of revivor against the representative of Sir John Hind Cotton, the original defendant: that an action of waste dies with the person; and, if the plaintiff had in other respects been in a condition to maintain waste against Sir John Hind Cotton, the party to the articles, it had been gone by his death; that the law is the same as to the action of trover, *pari ratione* he hath lost his equitable remedy for the waste.

Answer.—I admit the law to be clear, that an action of waste dies with the person; and I also admit, that I cannot find any authority or precedent for maintaining an action of trover against an executor upon a conversion by the testator in his lifetime: though, as to this point, I give no opinion; for thus much is certain, that an action of trover will lie for an executor, upon a conversion by the defendant in the lifetime of the plaintiff's testator, for which there are many authorities; and it seems difficult to be reconciled to reason and justice, that these remedies should not be mutual, even at the common law.

However, I will admit, for argument's sake, that the *action of trover for the timber was, as well as the strict [*737] action of waste would have been, gone at the common

¹ 11 Mod. 181; Com. Rep. 160.

² 2 Stra. 1179; 4 Bro. P. C. 496.

law; but, notwithstanding that, I am of opinion that the plaintiff is entitled to the same relief in this Court.

There have been several determinations in this court, where, by force of the rule, *actio personalis moritur cum persona*, the remedy at law hath been extinguished :¹ yet equity hath given the like satisfaction.

It is well known that, at common law, before the statute of 30 Car. 2, c. 7, and 4 & 5 Will. and Mary, c. 24, s. 12, no action or remedy could be had against the executor of an executor for a devastavit committed by the first executor of the goods of the original testator. But, notwithstanding this, equity did not scruple to get the better of this artificial maxim, and decreed an account and satisfaction against the representatives of such a wasting executor out of his assets.

This is laid down as a rule in equity by Lord Chancellor Nottingham, in the case of *Price v. Morgan*, 2 Ch. Cas., fol. 215. His words are, "Although by the common law, when the executor wastes, his executor shall not be liable, because it is a personal wrong, it is otherwise here, and the common law will come to it at last, and, therefore, whatever estate of the wasting executor is come to his representative, which his testator wasted, the personal estate of such wasting executor, in the hands of his executors shall answer."

When Lord Nottingham said the common law would come to it at last, he was a true prophet; for this case was decided in the 28th of Car. 2; and the law was altered by Act of Parliament in the 30th of Car. 2.

In 1 Ch. Cas. 121, *Eton College v. Beauchamp and Biggs*,² the provost and fellows of Eton were possessed of a rent or pension of 1*l.* 14*s.* per annum, granted by King Henry VI. to that college, issuing out of the lands. The defendant, Biggs, was executor of the tenant, and the bill was brought for a satisfaction of the arrears of rent incurred in his testator's lifetime, and suggested that the college did not know the lands out of which the rents [*738] were issuable, *and so could not distrain; and, though the person of the terre-tenant was not chargeable with the rent at law, but only the land by way of distress; yet, forasmuch as the testatrix held the land, and did not pay the rent, it was said, that thereby the testatrix's personal estate was augmented, and therefore the Master of the Rolls, Sir Harbottle Grimstone, decreed the executor to pay the arrears, as far as he had assets of the testatrix.

In 2 Mod. 293, *Anon. Error*, Hil., 29 Car. 2, in the Exchequer Chamber, before the Lord Chancellor and Lord Treasurer, assisted by the two Chief Justices, the case was, the plaintiff had declared against the defendant as executor of Edward Nicholls, who was executor of the debtor. The defendant pleaded, that the said debtor died intestate, and administration of his goods was granted

¹ See now 3 & 4 Wm. 4, c. 42, s. 2.

² *S. C.*, 1 Eq. Ca. Ab. 32.

to a stranger, absque hoc that Edward Nicholls was ever executor; but did not say by his plea, "or ever administered as executor;" for, in truth, he was executor de son tort. The plaintiff replied, that before the administration granted to the stranger, Edward Nicholls possessed himself of divers goods of the debtor, and made the defendant executor, and died; and to this application the defendant demurred. Judgment was given for the plaintiff, in the Court of Exchequer, but reversed in the Exchequer Chamber; for an executor de son tort is not liable at law; though the Lord Chancellor Nottingham said he would help the plaintiff in equity.

These authorities would be sufficient to establish the point I am now upon. But I go further, and hold, *that in all cases of fraud the remedy does not die with the person*; but the same relief shall be had against an executor out of the assets of his testator, as ought to have been given against the testator himself. For, as *equity disclaims the maxim, that a personal remedy dies with the person whenever the remedy is proper for that jurisdiction*, this Court will follow the estate of the party liable to that demand, and out of that decree satisfaction. Now, collusion between two persons, to the prejudice and loss of a third, is, in the eye of the Court, the same as a fraud; *and, you have observed, that one [*739] principal ground of the judgment of the Court in this case is collusion appearing upon the face of the articles set forth in the answer.

I have now gone through the arguments and objections arising upon the particular case, and the authorities of law and equity.

One general argument remains, of which the counsel on both sides did in their turns endeavour to avail themselves—I mean the argument ab inconvenienti, which undoubtedly is of weight, especially in a new case.

On the side of the defendants were urged the inconveniences that would arise from making such a precedent, which would tend to lock up the timber of the kingdom from coming to market; would create questions between possessors of estates and contingent remainder-men, springing up at a great length of time; and there would be no knowing where to stop.

But let these inconveniences be compared with the inconveniences that must follow, on the other hand, from laying it down that a contingent remainder-man cannot possibly have any remedy in such a case—I say, let them be compared, and the former will weigh nothing, in the opposite scale, against the latter.

Thus far the law allows settlements of estates to go, and no further; and it hath been found to be a convenient medium between perpetuities and too flux and unstable a condition of things. Most of the family estates in this kingdom are under such settlements; and it frequently happens that the first remainder-man of the inheritance vested is a remote relation—remote in blood,

and remote in the prospect of succession, perhaps after fifty years' contingent limitation of that inheritance.

If what has been done in this case should be determined to be done impune, without any possible recompense in a court of equity, what havoc would it make, and what a licence would be proclaimed! Every remainder-man in fee, though after ever so many contingent limitations, might, by collusion with the tenant for life, or years in possession, or perhaps of his under-tenant, [*740] *strip the estate, and convert the value of it to their own use. Suppose an estate in the great timber counties of England, in the north, or in Cornwall, where the principal value may consist in timber or mines, all that value may be exhausted and dissipated before a first son is born; and when he is born, he may find nothing but the shell of what was intended for a lasting support of a family of honour.

It will be no answer to this, to say the trustees to preserve contingent remainders may bring a bill for an injunction to stop this mischief; the mischief may be completely executed before they know of it, nay, possibly before they can know whether they are trustees or not; for it most frequently happens, that trustees to perserve contingent uses are inserted in settlements and wills, without their being made acquainted with it.

From hence it is evident that this will be but a shadow of a remedy, unless the Court goes further, and builds a more adequate relief upon the same principles.

And here I cannot help adding, that this becomes of the greater importance, from the practice and abuses of the times into which we are fallen, when so many new inventions and contrivances daily show themselves in courts of justice, to supply or to tempt, or to impose upon the extravagance and necessities of tenants for life, to the destruction of their families.

These considerations bring to my mind the last reasoning of the judges in *Fermor's case*, 3 Co. 79, a; and with that I will conclude.

That resolution was quite new, and of the first impression, and was contrary to the letter of the statute of the 4th of Hen. 7 c. 24; but the book says—"Lastly, the judges in this resolution did greatly respect the general mischief which would ensue if such fines, levied by practice and covin of persons who had particular interests, should bar those who had the inheritance."¹

The result of the whole is, I must decree satisfaction to the plaintiff for what the late Sir John Hind Cotton received out of [*741] his assets; and if the original limitations *had been still subsisting, I must have directed this money to have been laid out in the lands to the same uses: but as these are now barred, and the plaintiff is tenant in fee, the money is his own.

In this, the question of interest is material, and I have considered it: the principal money is reckoned by the answer at

¹ See 3 Co. 79, a.

1000*l.*; the cause being heard on bill and answer, and the plaintiff having at the bar prayed interest from the time it was received, in respect of the possible growth of timber.

But there being no proof, it does not appear what was the condition of the timber; whether, by the time the plaintiff's father died, in 1727, it might not have been decayed, and of little value; what might have been exhausted in repairs or destroyed by tempests or accidents; or what young timber may have grown up in its place in the meantime; from these considerations, and as this is a new case, I do not think fit to give interest further back than the filing of the bill.

"His Lordship declared, that, on all the circumstances of the case, the plaintiff is entitled to recover satisfaction in this court for so much value of his inheritance as the defendant's testator exhausted and received by virtue or colour of the articles entered into between him and the plaintiff's late father, who was tenant only for the term of ninety-nine years, if he should so long live; and ordered that the Master, to whom he referred it, should compute interest on the sum of 1000*l.*, admitted by the answer of Sir John Hind Cotton, deceased, to have been received by him, from the time of filing the plaintiff's bill, after the rate of four per cent. per annum, and tax the plaintiff his costs; and that what shall be so found due to the plaintiff for the 1000*l.*, interest and costs, be considered as a demand by simple contract on the estate of Sir John Hind Cotton, deceased, and be answered and paid to the plaintiff, by the defendants, the executors, they having admitted assets of their testator, Sir John Hind Cotton, by their answer to the bill of revivor."

* *Garth v. Cotton* (the judgment in which is said by Lord St. Leonards, in his learned work upon Powers, to be one of the ablest ever delivered) is here given complete, the statement of the case, and the arguments having been taken from 1 Ves. 524, 546; the judgment from 1 Dick. 183, where it is stated to have been copied from Lord Hardwicke's MS.; and the decree from 3 Atk. 758.

Under the devise, in *Garth v. Cotton*, to the plaintiff's father, for ninety-nine years, if he should so long live, *without impeachment of waste, voluntary waste excepted*, Lord Hardwicke considered him as punishable for *wilful waste*, and that he had no present right to or interest in the timber, other than the mast, and shade, and necessary botes, the exception of "*voluntary waste*" rendering the preceding part of the clause, "*without impeachment of waste*" (which, standing alone, would have conferred upon him the power of felling the timber), of no effect.

See the remarks upon *Garth v. Cotton*, in the recent case of *Vincent*

¹ Decree taken from 3 Atk. 758; Reg. Lib. 1752, A., fol. 240.

v. *Spicer*, 22 Beav. 380, where Sir John Romilly, M. R., terms it "a very strong case" (p. 385). The facts there were briefly as follow:—Sir F. Vincent, on his marriage settled his estate on himself for life, "without impeachment for any manner of waste, save and except spoil or destruction, or voluntary or permissive waste, or suffering houses or buildings to go to decay, and in not repairing the same." It was held by his Honor, that Sir F. Vincent was entitled to cut all such timber (except ornamental), as the owner of the estate in fee simple, having due regard to his present interest and to the permanent advantage of his estate, might properly cut, in a due course of management.

A direction that a lessee of mines is "not to be dipunishable with waste" will be rejected as repugnant to a power to let an estate with "the mines and minerals;" *Daly v. Beckett*, 24 Beav. 114.

The importance formerly of the limitation to trustees to preserve contingent remainders, the history of which is so admirably given by Lord Hardwicke, is well illustrated in *Garth v. Cotton*; for, as the plaintiff's father was only tenant for years, if there had been no such limitation, all the contingent remainders would have been void, for want of an estate of freehold to support them; and Sir John Hind Cotton would have had the immediate freehold, as well as the inheritance in him, which would have given him a clear right to commit waste.

If the plaintiff's father had been tenant for life, and there had been no such limitation, the trustees, the plaintiff, could, even then, have been entitled to no remedy, because his whole use in the land, whilst it remained in contingency, would have been in the power of [*743] *the tenant for life to bar by fine, feoffment, or surrender to the remainder-man vested; and there could have been no pretence for the Court to interpose, to preserve or restore to him part of that inheritance, the whole of which was in the power of the tenant for life.

The foundation of the plaintiff's equity depended entirely upon the estate limited to the trustees to preserve contingent remainders; it was their duty to preserve the inheritance, consisting of the land, timber, and mines, entire. The trustees might have brought a bill to stay waste against the act of the plaintiff's father and the remainder-man; and Lord Hardwicke expressly decided, that their neglect or ignorance of their duty should not prejudice the tenant in tail not in esse at the time when the waste was committed.

It was indeed, admitted by Lord Hardwicke, that where there is tenant for life, or for years, subject to waste, if timber is blown down by accident, or cut down by the tort of a stranger, or of the tenant for life alone, the owner of the first remainder of inheritance vested should have the benefit of it; because, he observes, "The common law doth not, nor can, consider the contingent uses as having existence till they happen: therefore, according to *Lewis Bowles's Case*, 11 Co. 79, and *Udal v.*

Udal, Aleyn, 81, an estate in contingency is as no estate till the contingency happens. And when the trees are severed, the property must vest immediately in somebody, and that can only be in the first remainder-man of inheritance vested; and on the foundation of that property, he may maintain trover for them. This is his right at law; and there is in the cases put of trees fallen by accident, or merely by the wrongful act of a stranger, or of the tenant for life, no ground of equity to take it from him." See *Whitfield v. Bewit*, 2 P. Wms. 240, and *Duke of Newcastle v. Vane*, there cited. In *Garth v. Cotton*, the timber was not blown down by accident, or cut by the tort of a stranger, or of a tenant for life alone, but was felled by the tenant for years and remote remainder-man, *in collusion together*, who, although at law entitled to the proceeds arising from the sale, were in equity (which has always interfered in matters of waste more extensively than courts of law) held accountable to the tenant in tail not then in esse, because they had collusively committed an act which greatly damnified him, and for which he had no remedy at law. The same result would have followed had Garth been tenant for life instead of tenant for years.

Upon the same principle, where there was a limitation in a settlement to A. for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail, remainder *to B. for life, remainder to his first and other sons in tail, with [*744] reversion in fee to A., A. cut down timber; but Lord Hardwicke, upon a bill being filed by B., the second tenant for life, granted an injunction, observing, that the trustees to preserve contingent remainders might have brought a bill against the defendant to stay waste, for the benefit of the contingent remainders; and that the plaintiff could do so, because, though he had no right to the timber, yet if the defendant, the first tenant for life should die without issue, he would have an interest in the mast and shade of the timber: *Perrot v. Perrot*, 3 Atk. 94; *Davies v. Leo*, 6 Ves. 784; *Birch-Wolfe v. Birch*, 9 L. R. Eq. 683; and the money arising from the sale of the timber in such a case will be preserved for the contingent remainder-men: *Williams v. Duke of Bolton*, 3 P. Wms. 268, Cox's note; it being a rule in equity, that where a tenant for life impeachable for waste cuts down timber without leave of the Court, he will never be permitted to derive any benefit from it: *Seagram v. Knight*, 2 L. R. Ch. App. 628.

But before giving relief in a case such as *Williams v. Duke of Bolton* (3 Ves. 374), where the tenant for life contains in himself the character of remainder-man or reversioner in fee, the Court must be satisfied that the acts of the deceased tenant for life were such as amounted to collusion between the two characters which he united in himself. Accordingly, where it was shown that the tenant for life, being also the ultimate remainder-man in fee, had laid out sums in permanent improvements on the estate at least equal to the value of the amount realized by

the acts of waste, which were of themselves of a trivial amount, the bill was dismissed; *Birch-Wolfe v. Birch*, 9 L. R. Eq. 683.

And where the executor of a deceased tenant for life, who was also ultimate remainder-man in fee, admitted having received the proceeds of certain timber, cut, or ordered to be cut, by his testator, he was allowed, in the account to be taken against him, to take credit for the sums laid out by his testator in permanent improvements. *Ib.*

By 8 & 9 Vict. c. 106, s. 8, it is enacted, "that a contingent remainder, existing at any time after the 31st day of December, 1844, shall be, and if created before the passing of the Act, shall be deemed to have been, capable of taking effect, notwithstanding the determination, by forfeiture, surrender, or merger, of any preceding estate of freehold, in the same manner, in all respects, as if such determination had not happened." Suppose, in a case coming within the Act, the limitation to trustees to support contingent limitations is omitted, could either a [*745] tenant for *years, or a tenant for life, with the person in whom the first remainder of the inheritance is vested, cut the timber without being liable to be called to an account by the contingent remainder-men when they come in esse? In *Garth v. Cotton*, Lord Hardwicke, as before observed, expressly admits, that if there had been no trustees to support contingent remainders, in neither of these cases could relief be had in equity. It is, however, presumed that in the latter of these cases, that is to say where there is a tenant for life, relief might now be had by the contingent remainder-man, because his inheritance, of which the timber is part, is no longer in the power of the owner of the previous estate of freehold. But in the former of these cases, that is to say where there is a tenant for years, no relief could be had, because, notwithstanding the late Act, the contingent remainders would be void for want of an estate of freehold to support them. Where, therefore, the legal fee is not vested in trustees, a limitation to trustees to support contingent remainders may still be necessary, when there is only a previous estate for years; and it is conceived that even where there is a previous estate of freehold, it may still be useful, as the trustees to support contingent remainders can, by an application for an injunction before the contingent remainder-man comes into esse, protect his estate from waste.

In the case of an executory devise, Lord Hardwicke, in *Robinson v. Litton*, 3 Atk. 209, said that he should doubt whether an heir-at-law ought not to be restrained from committing waste in the meantime. In that case the testator devised lands to his son and his heirs, but in case he should not attain twenty-one, and die without issue, then he gave the lands to his daughters, and directed them to be sold and the money to be divided among the daughters. The son, who wanted three quarters of a year of twenty-one, intended cutting down 3000*l.* worth of timber, but Lord Hardwicke granted an injunction to restrain him, and

at the hearing made that injunction perpetual, observing, "It is pursuing the intention of the testator, and preserving the value of the estates intended to go to his daughters." And Lord Eldon, in the case of *Stansfield v. Habergham*, 10 Ves. 278, stated it to be the doctrine of the Court that, where there is an executory devise over, even of a legal estate, a Court of equity will not permit the timber to be cut down, more especially not, if there is an executory devise of a trust estate.

Recent cases, however, appear to decide that a devisee in fee with an executory devise over on his death without leaving issue is punishable for legal waste, but he must not commit equitable waste: [*746] *Turner v. Wright*, 1 Johns. 740, 2 De G. F. & Jo. 234; and it has also been decided that although a tenant in fee, subject to an executory devise over, is not impeachable for legal waste, it is competent to a testator to render him so by express words: *Blake v. Peters*, 10 W. R. (V. C. K.) 826; 1 De G. Jo. & Sm. 345.

One of the first instances of the interposition of equity, where an action of waste could not be maintained at law, seems to have been the case put by Lord Hardwicke in *Garth v. Cotton*, of a tenant for life, with remainder to another for life, with remainder over in fee, or in tail. In such case the remainder-man in fee, or in tail, could have no action of waste; because the plaintiff in the action must recover the place wasted, and that would be an injustice to the remainder for life, which is not forfeited; and, if it should be recovered by the owner of the inheritance, it would never go back again. The remainder-man might, it is true, have another action of trover for the trees. However, in equity, to use the words of Lord Hardwicke, "this Court sustains a bill for an injunction, and this ab antiquo, according to the case in *Moore*, 554; where Lord Ellesmere says, he had seen a precedent for it so long ago as in the reign of Richard II." See also, *Tracey v. Tracey*, 1 Vern. 23; *Farrant v. Lovel*, 3 Atk. 723; and an injunction will be granted at the suit of a mesne remainder-man for life, without making the owner of the inheritance a party; *Dayrell v. Champneys*, 1 Eq. Ca. Ab. 400. But see *Mollineux v. Powell*, 3 P. Wms. 268, n.

So, likewise, where there is tenant for life subject to waste, remainder for life punishable for waste, remainder in fee, the Court will not suffer an agreement between the two tenants for life to commit waste to take place against the remainder-man, before the time comes when the second tenant for life's power commences. Per Lord Hardwicke, C., in *Robinson v. Litton*, 3 Atk. 210.

So, a ground landlord may have an injunction to stay waste against an under lessee, who holds by lease from the original lessee; *Farrant v. Lovel*, 3 Atk. 723.

So, where a mortgage in fee in possession commits waste by cutting down timber, and the money arising by the sale of the timber is not applied in sinking the interest and principal of his mortgage, the Court,

on a bill brought by the mortgagor to stay waste, will grant an injunction; *Farrant v. Lovel*, 3 Atk. 723.

A mortgagor in possession may be restrained by the mortgagee from felling timber (*Farrant v. Lovel*, 3 Atk. 723; *Usborn v. Usborn*, 1 Dick. 75; *Humphreys v. Harrison*, 1 J. & W. 581); but not, it seems, unless he makes it appear that the security would be insufficient or [*747] scanty without the *timber; *Hippesley v. Spencer*, 5 Madd. 422; *King v. Smith*, 2 Hare, 239.

It seems to be now settled that the Court will not interfere to prevent or remedy permissive waste. The contrary opinion seems formerly to have prevailed. Thus, in *Parteriche v. Powlet* (2 Atk. 383), where an exception was taken to the Master's report, that he had charged the tenant for life *without impeachment of waste*, with several sums for the repairs of tenants' houses upon the estate, Lord Hardwicke, C., overruled the exception, and said, "Notwithstanding tenant for life is without impeachment of waste, he shall be obliged to keep tenants' houses in repair, unless the charge is excessive, and shall not suffer them to run to ruin." However, in *The Marquis of Lansdowne v. The Marchioness Dowager of Lansdowne* (1 J. & W. 522), an account against the representative of tenant for life without impeachment of waste, for dilapidations in and about a mansion-house, was refused by Sir John Leach, M. R., who, although the case of *Parteriche v. Powlet* was cited, expressed himself to be satisfied that no account of dilapidations could be decreed, observing that, with respect to incumbrants, the law was otherwise, and accordingly suits against their representatives were very common; but no instances of such suits by remainder-men had occurred.

So, in *Powys v. Blagrove* (4 De Gex, Mac. & G. 448), where a testator by his will directed his trustees, after payment of the expenses of keeping his estate in repair, and all such costs as "my said trustees shall expend or be put unto by means of the trusts hereby reposed in them," to pay out of the overplus rents and profits certain sums, and after payment thereof, to pay the rents to two persons successively for life, with remainder to trustees to preserve, with remainder to first and other sons of the second tenant for life successively in remainder, and the several heirs male of the body of such sons. A bill was filed by the trustees, at the instance of one of the remainder men in tail, against the second tenant for life, for the purpose of making him liable for permissive waste; it was held by Lord Cranworth, C., affirming the decision of Sir W. Page Wood, V. C. (Kay, 495), that the Court could not interfere in cases of permissive waste. "It was argued," said his Lordship, "independently of the trust, that it is the duty of the tenant for life to repair 'Equitas sequitur legem.' But even legal liability now is very doubtful; *Gibson v. Wells*, 1 B. & P. N. R. 291; *Herne v. Benbow*, 4 Taunt. 764. Whatever be the legal liability, the Court has al-

ways declined to interfere against mere permissive waste; *Lord Castlemain v. Lord Craven* *(22 Vin. Ab. 523, tit. 'Waste,' pl. 11), [*748] there the Master of the Rolls said, 'the Court never interposes in case of permissive waste, either to prohibit or to give satisfaction, as it does in wilful waste.' On this ground relief was refused in *Wood v. Gaynon* (Amb. 395). In that case, a tenant for life had been guilty of permissive waste, and the plaintiff and one of the defendants, Benjamin Lyme, were the reversioners; Lyme refused to join with the plaintiff in an action at law. The Master of the Rolls refused to assist the plaintiff, saying, that as there was no precedent he would not make one; adopting the argument, that it would tend to harass tenants for life and jointresses, and that suits of this kind would be attended with great expense in depositions about the repairs. With respect to the case of *Caldwell v. Baylis* (2 Mer. 408), it does not sustain the doctrine for which it was cited. The case of *Re Skingley* (3 Mac. & G. 221) was founded on the express obligation of the lunatic to keep in repair." See also *White v. Cann*, 1 Ir. Ch. Rep. 205.

As to the legal liability for permissive waste, see *Greene v. Cole*, 2 Wms. Saund. 252, and notes; and *Harnett v. Mailland*, 16 M. & W. 257.

But an account would be granted where there is an express covenant from the tenant for life to repair; *Marsh v. Wells*, 2 S. & S. 87.

At common law, the clause, *without impeachment of waste*, only exempted a tenant for life from the penalty of the statute, the recovery of treble value, and the place wasted, not expressly giving the property of the thing wasted; but in *Lewis Bowles' case* (11 Co. 79), it was determined that these words also gave the *property*. The necessary consequence of which is, that, in general, unless in particular circumstances, as, for instance, where the exemption from liability to waste is made subordinate to a discretionary power in trustees to fell timber (*Keke-wich v. Marker*, 3 Mac. & G. 311; and see *Briggs v. Earl of Oxford*, 5 De Gex & Sm. 156); a tenant for life *without impeachment of waste* cannot be restrained in equity from committing waste; for that would be to determine that he should not make use of the property which the law allowed him. But, afterwards, several instances were considered, in which this very large power might be exercised contrary to conscience, and in an unreasonable manner, by a tenant for life; as, where his act was to the destruction of the thing settled, and equity interfered. See *Aston v. Aston*, 1 Ves. 265.

A leading authority upon this subject is *Vane v. Lord Barnard*, 2 Vern. 738, commonly called *Lord Barnard's case*; there Lord Barnard, who, under the marriage settlement of his son, was tenant *for [*749] life *without impeachment of waste*, of Raby Castle, with remainder to his son for life, having taken some displeasure against his son, got two hundred workmen together, and of a sudden, in a few days, stripped the castle of the lead, iron, glass doors, boards, &c., to

the value of 3000*l*. Lord Cowper granted an injunction to stay committing of waste by pulling down the castle, and decreed that the castle should be put in its former condition; and, for that purpose a commission was to issue to ascertain what ought to be repaired, and a Master was directed to see it done at the expense of Lord Barnard, and decreed the plaintiff his costs. See *S. C.*, Prec. Ch. 454; Gilb. Eq. Rep. 127; 1 Eq. Ca. 399; 1 Salk. 161; and see *Duke of Leeds v. Earl of Amherst*, 20 Beav. 239.

Although the Courts of Equity will not, in the absence of fraud and where there is no privity between the parties, interfere at the instance of a party claiming real property under a legal title, by restraining ordinary waste by a defendant in possession thereof, they will grant an injunction to restrain waste of a malicious and destructive character, such as the pulling down the capital messuage, stripping the estate of its timber, or such-like acts, even although the title of the plaintiff may be denied by the defendant; *Earl Talbot v. Hope Scott*, 4 K. & J. 96; *Neale v. Cripps*, 4 K. & J. 472. And see *Anwyll v. Owens*, 22 L. J. Ch. 995.

But where a plaintiff in possession seeks to restrain one who claims by an adverse title, the tendency of the Court is to grant an injunction, at least when the acts committed do or may tend to the destruction of the estate. See *Lowndes v. Belle*, 33 L. J. N. S. (Ch.) 451; 12 W. R. (V. C. K.) 399: in that case, a person, not being in possession of an estate, claimed it as heir at law, and entered upon it, cut down trees, and cut sods, and threatened to repeat his conduct in order to establish his alleged title as against the possessor, who by himself and his ancestors had been in possession of the estate for upwards of eighty years, it was held by Sir R. T. Kindersley, V. C., upon a bill filed by the possessor against the claimant, that as the acts of the defendant might be injurious to the inheritance, he must be restrained by the injunction of the Court from committing them.

So, likewise, upon the principle of restraining a tenant for life without impeachment of waste from exercising his legal power contrary to conscience, and in an unreasonable manner, Lord Hardwicke said, that if tenant for life without impeachment of waste, pulled down farm-houses, in general he would no more scruple restraining him, than he would from pulling down the mansion-house (unless he pulled down two [*750] to *make into one, in order to bear the burthen of but one), it tending equally to the destruction of the thing settled. So, if he should grub up a wood settled, so as to destroy the wood absolutely, he should restrain him, as it would be what is termed in *Abraham v. Bubb* (2 Freem. 54) *extravagant and humorsome waste*; *Aston v. Aston*, 1 Ves. 265.

Although a tenant for life without impeachment of waste, and a tenant in tail after possibility of issue extinct, may fell all the ordinary timber upon the estate, it has long been established, that a Court of

equity will restrain them from committing what is called *equitable waste*, by felling timber planted or left standing for the shelter or ornament of a mansion-house or grounds (*Rolt v. Lord Somerville*, 2 Eq. Ca. Ab. 759; *Packington's case*, 3 Atk. 215; *Strathmore v. Bowes*, 2 Bro. C. C. 166; *Chamberlyne v. Dummer*, 1 Bro. C. C. 166; 3 Bro. C. C. 549), even if planted by the tenant for life himself: *Coffin v. Coffin*, Jac. 71.

"The principle upon which the Court has gone, seems to be, that if the testator, or the author of the interest by deed, had gratified his own taste by planting for ornament, though he had adopted the species the most disgusting to the tenant for life, and the most agreeable to the tenant in tail, and, upon a competition between those parties, the Court should see that the tenant for life was right, and the other wrong, in point of taste, yet the taste of the testator, like his will, binds them; and, it is not competent to them to substitute another species of ornament for that which the testator designed. The question, which is the most fit method of clothing an estate with timber for the purpose of ornament, cannot be safely trusted to the Court."—Per Lord Eldon, in *Marquis of Downshire v. Lady Sandys*, 6 Ves. 110. So, likewise, Sir William Grant has observed, "As the Court cannot determine what is ornamental timber, it being merely a matter of taste, they therefore say, that what was planted for ornament must be considered as ornamental;" *Lord Mahon v. Lord Stanhope*, 3 Madd. 423, n.; and see *Burges v. Lamb*, 16 Ves. 174; *Coffin v. Coffin*, Jac. 70; *Marker v. Marker*, 9 Hare, 1, 17.

"The principle has been extended from the ornament of the house to outhouses and grounds, then to plantations, vistas, avenues, and to all the rides about the estate for ten miles round."—Per Lord Eldon, C., 6 Ves. 110; and see *Jebb v. Jebb*, *Johnes v. Johnes*, and *Lord Tamworth v. Lord Ferrers*, cited 6 Ves. 110; *Williams v. M'Namara*, 8 Ves. 70; but although the protection may be afforded to rides or avenues at a considerable distance from a mansion, it will not necessarily be extended to the woods through which they pass, so as to prevent their being cut for repairs; *Wombwell v. Belasyse*, 6 Ves. 110 a. n. [*751] 2nd ed.

In *The Marquis of Downshire v. Lady Sandys*, 6 Ves. 107, the injunction was extended to clumps of firs on a common two miles from the house, although land belonging to other persons intervened. "If," observed Lord Eldon, C., "the principle has been rightly applied, it is very difficult in argument to say, it cannot be applied to a common as well as infield lands, and that the contiguity or remoteness, *if defacto it was planted for ornament*, can alter the principle upon which the rule of the Court is to be applied." And in *Day v. Merry*, 16 Ves. 375, the principle applicable to equitable waste was extended to trees planted for the purpose of excluding objects from view.

But circumstances may render the felling of ornamental timber justifiable. "For, if a tempest had produced gaps in a piece of ornamental planting, by which unequal and discordant breaks and divisions were occasioned, it would be going too far to hold, that cutting a few trees to produce an uniform and consistent, instead of an unpleasant and disjointed appearance, should be construed waste."—Per Sir William Grant, M. R., in *Lord Mahon v. Lord Stanhope*, 3 Madd. 523, n.

So it seems that timber might be cut which injured or impeded the growth of any other trees adjoining thereto, which were of so much importance to the purposes of ornament or shelter, that the removal of the timber so cut was essential to such purposes of ornament or shelter; *Lushington v. Boldero*, 6 Madd. 149, 150.

So, likewise, ornamental timber may be felled if it be so near to a house as to be prejudicial to its healthiness, but the onus of proof will lie upon the persons felling the timber. See *Campbell v. Allgood* (17 Beav. 623); there trustees, at the request of a tenant to whom they had let a house, cut down some beech trees, and a large horse-chestnut, which sheltered the windows of the mansion-house and servants' hall, and were about to cut down more. Sir J. Romilly, M. R., granted an injunction against the trustees, although he refused it as to the tenant, as it was not shown that he either had, or was about to commit, any waste. "Upon the result of the evidence," said his Honor, "I think that these trees did form a shelter to and hide that part of the house, which, as it contained the offices, probably was the most unsightly. I am of opinion, also, that the horse-chestnut tree was, to some extent, prejudicial to the healthiness of the house, but I am not satisfied that such was the case with respect to the beech trees. The *burthen of proof lies on the trustees to satisfy me that they were prejudicial*, for they had no authority to cut trees which were ornamental, and conducive to the *beauty of the house. I think they ought to have [*752] applied, either to the persons interested in the property for their assent, or to the Court for its authority in cutting these trees; and as they have not satisfied me that it *was absolutely necessary* for the well-being, salubrity, and comfort of the residence, that these trees should be cut, I think I must grant an injunction."

It has been observed, that ornamental timber has been protected from its connection with a mansion-house or its grounds; the question, therefore, naturally arises, whether, when a mansion-house has been pulled down, the Court will still interfere to preserve the timber.

Where the owner in fee of an estate, with a mansion-house upon it, and trees planted, or left standing for ornament around or about the mansion-house, pulls it down without any intention of rebuilding it, a tenant for life without impeachment of waste, under the will of such an owner, is entitled to cut down the trees. See *Micklethwait v. Micklethwait*, 5 W. R. (L. J.) 861; 26 L. J. (Ch.) 721; 3 Jur. N. S. 1279; 1

De G. & Jo. 504. There the testator was tenant for life of estates at Beeston and Taverham, with remainder to his eldest son and his issue male, with remainder to himself in fee. In the year 1827, the testator abandoned Beeston as a place of residence; and in 1846, with the consent of his eldest son, he pulled down and demolished the house, without any intention of rebuilding it. By his will, dated the 29th of May, 1852, the testator devised the two estates to his second son, the defendant, for life, without impeachment of waste, except voluntary waste in pulling down buildings without rebuilding the same or others of equal or greater value, with remainder to his issue, with remainder to the plaintiff. The testator died in 1856. Afterwards, his eldest son died without issue, whereupon the defendant entered into possession as tenant for life under the testator's will. He threatened to cut down the trees in the avenue and park at Beeston. It was held by the Lords Justices of the Court of Appeal, dissolving an injunction granted by Sir W. Page Wood, V. C. (reported, 3 Jur. (N. S.) 765, 5 W. R. 640), that as between the parties to the suit the testator was to be regarded as if he had been owner in fee of the estate when he made his will, and that as he had pulled down the mansion-house, the Court would not interfere to protect the trees in the avenue and park as ornamental. "If," said Lord Justice Turner, "a deviser, or settlor, occupies a mansion-house, with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state of occupation, and devises or settles it, so as to go in a *course of succession, he may reasonably be presumed to anticipate, that those who are to succeed him [*753] will occupy the mansion-house; and it cannot be presumed that he meant it to be denuded of that ornament which he himself enjoyed. This Court, therefore, in such a case, protects the trees against the acts of the tenant for life. But if, on the other hand, the deviser or settlor himself pulls down the mansion-house, upon what ground is it to be presumed that he intended that which is incident to the mansion-house to be preserved? Is it to be presumed that he meant that the incident should be preserved when he has himself destroyed the principal? It was said for the plaintiff that the testator may have intended that the trees should be preserved as an ornament to the estate without reference to the mansion-house, and it was argued that if the trees were, in fact, planted, or left standing for ornament, it could make no difference whether there was a mansion-house on the estate or not; but there is a plain difference between cases in which there is, and cases in which there is not, a mansion-house on the estate. In the former case, continued residence may well be presumed to have been contemplated; in the latter it cannot. There is another consideration which seems to me to have an important bearing upon this case. These trees are assumed to have been planted for ornament to the mansion-house; are they to be preserved for ornament to the estate when the mansion-house is pulled

down? Are trees which are planted for one purpose to be protected for another? The difficulty in which the Court will be involved if it carries the doctrine of equitable waste to the length contended for by the plaintiff is, I think, also a matter not unworthy consideration. It is already difficult in many cases to determine whether trees have been planted or left standing for ornament, but the existence of the mansion-house generally furnishes some criterion for determining the point. How is the loss of that criterion to be supplied?"

Where, however, it is either proved, or may be inferred, that in demolishing, or after the demolition of a mansion-house, a testator intended, designed, or wished to rebuild it, or to reside at, or erect a mansion-house, or place of residence on that estate, or intended, designed, or wished, that any devisee under his will should do so, timber, which was ornamental to the mansion-house while in existence, might be protected by the Court from being felled by a tenant for life without impeachment of waste. See the remarks of Lord Justice Knight Bruce in *Micklethwait v. Micklethwait*, 5 W. R. (L. J.) 862; 1 De G. & Jo. 519.

[*754] *In two well-known cases, the ornamental timber has been protected although the mansion-house has been pulled down. The first of these cases is, *Wellesley v. Wellesley*, 6 Sim. 497; there a mansion-house, park, and pleasure-grounds, and several ornamental villas near the park, were limited in strict settlement, under which the defendant was tenant for life without impeachment of waste, with remainder to his first and other sons, successively in tail male. And the tenant for life in possession was empowered to grant *building leases* of the settled estates, and the trustees were empowered, at the request of the tenant for life, to cause the mansion-house to be pulled down, or any other mansion-houses which then were, or should be, standing upon any part of the estates, without rebuilding the same, and to sell the materials thereof, and apply the proceeds in paying off incumbrances on the estates. When the settlement was executed, the park, pleasure-grounds, and gardens, contained a great number of trees which had been planted, or were left standing for the ornament or shelter of the mansion-house, park, and pleasure-grounds, in clumps, lines, avenues, or vistas, or in single trees; and the lands adjoining to, and forming the approaches to the mansion-house, park, and pleasure-grounds also contained a great number of trees, which had been planted or left standing for the ornament or shelter of the mansion-house, park, or pleasure-grounds, and also of the villas contiguous thereto. The mansion-house was pulled down pursuant to the power, and the materials sold. The bill alleged that a large proportion of the trees marked for felling were not fit to be felled for timber, and that by the felling thereof, the whole of the demesne would be laid waste and become wholly incapable for a very long period of years of being applied to the purposes of a residence, either by the persons who, under the settlement, might thereafter be

come entitled in *possession* to the inheritance of the domain, or by those to whom such persons might *demise the same*, and that the lands and messuages erected thereon, would be greatly injured or lessened in value. The bill prayed that the defendant might be restrained from cutting down any timber or other trees then standing in and upon the park, garden, and pleasure-grounds, and which were planted or growing there for the protection or shelter of the park, garden, and pleasure-grounds, or for the ornament thereof, or from felling or cutting down any timber or other trees which were planted, and stood, or grew in avenues, vistas, or clumps, or separately or singly, for the ornament of the park, garden, and pleasure-grounds, or other grounds and lands thereto belonging. Sir L. Shadwell, V. C., *granted an injunction *ex parte*; and Lord Lyndhurst, C., refused to dissolve it [*755] on the coming in of the answer. It was argued upon the hearing that there was no case in which, the mansion-house having been pulled down under a provision of the settlement, the Court had protected the timber which would have been ornamental to it if it had remained: that the timber was connected with the house, and the house being gone, the protection of the Court had ceased. But Sir L. Shadwell, V. C., made the injunction perpetual, considering, as no new evidence was produced, that he was bound by what Lord Lyndhurst had done.

The other case is that of *Morris v. Morris*, 15 Sim. 505; there estates were settled by the grandfather of the plaintiff on himself for life, remainder to trustees for 1000 years upon certain trusts, and subject thereto *to the use* of the same trustees during the life of the defendant (the son of the settlor), *without impeachment of waste* (provided the same should be committed or suffered with the privity and assent of the defendant), upon trust, to preserve the contingent remainders thereafter limited, and to permit the defendant to receive the rents of the estates during his life, with remainder to the use of the plaintiff during his life, with remainder to the use of the plaintiff's first and other sons successively in tail male, with remainder to the use of himself in fee. And the settlor reserved to himself, and gave to the defendant and plaintiff, when they should be in possession or in receipt of the rents of the estates, power to grant *building leases*. On the death of the settlor, the defendant entered into possession of the estates; and, whilst the plaintiff was an infant, pulled down the mansion-house thereon. Some years after the plaintiff had attained twenty-one, the defendant felled some, and marked for felling other trees, which his father had either planted or left standing and growing for the ornament or shelter of the house, in the lawns, gardens, and pleasure-grounds belonging to it. Whereupon, the bill was filed to restrain the defendant from felling any more trees, but did not ask any relief with regard to the pulling down of the house. Sir L. Shadwell, V. C., granted the injunction. "It appears to me," said his Honor, "that the general rule regarding trees



planted for shelter and ornament must apply to this case, unless upon the face of the settlement, or independently of the settlement, you can show that the rule is not applicable. I admit that this case differs very widely in some respects from the case of *Wellesley v. Wellesley*; but I observe that there is a power in the settlement to demise to persons who shall be willing to build houses or to repair houses; and I think [*756] that that does tend to sustain the right of those in remainder *to have the trees preserved which were originally planted for shelter and ornament. Because, though the mansion-house, which the trees were intended to shelter and ornament, no longer exists, yet there is a possibility of leases being made for the purpose of building houses, which may receive a benefit from the ornament or shelter afforded by the trees; and, in that respect, it is something like the case of *Wellesley v. Wellesley*. But my opinion is, that I am bound to administer the general law of this Court, which will not permit the person who is merely tenant for life without impeachment of waste, to cut down these trees, which, it is admitted on all hands, were either planted or left standing for shelter and ornament." This decision was affirmed on appeal by Lord Cottenham, 11 Jur. 196.

With reference to the case of *Morris v. Morris*, Lord Justice Turner has observed, that there seem to be two grounds on which the injunction in that case was granted;—that the *tenant for life* could not, by pulling down the mansion-house, entitle himself to the ornamental timber; and that if he was justified in pulling down the mansion-house by reason of the estate in trustees being unimpeachable of waste, there was an intention to be collected from the power to grant building leases, that the mansion-house should be rebuilt: and that it was upon the latter ground, too, and upon the ground of there being villas upon the estate, and the general scope of the settlement that the case of *Wellesley v. Wellesley* seems to have proceeded. See 5 W. R. (L. J.) 864; 1 De G. & Jo. 529.

A Court of equity will restrain a tenant for life *without* impeachment of waste, from cutting down saplings not proper to be felled (*O'Brien v. O'Brien*, Amb. 107; *Marquis of Downshire v. Lady Sandys*, 6 Ves. 108; *Coffin v. Coffin*, 6 Madd. 17); and from cutting underwood before it is of sufficient growth (*Brydges v. Stevens*, 6 Madd. 279); but not from felling timber, merely because it is not full grown or proper for building; for, as observed by Lord Hardwicke, C., the reasoning of the cases of pulling down farm or mansion-houses, or felling trees planted for ornament or shelter, does not come up to this. The consequence of cutting down timber, perhaps too young, does not tend to the destruction of the thing settled, although it tends to its prejudice for a time, for timber will grow again in a few years: not so of houses. Nor will young trees planted in avenue, pulled down, serve for the purpose as before; for, having been put there for the convenient enjoyment of the

house, they are considered as appurtenant thereto, and can no more be destroyed by such tenant for life than the house itself. But it would be very dangerous for *the Court to use such latitude as to extend [*757] this to the taking away the profits of the estate by tenant for life, to the prejudice of the remainder-man, which his estate for life without impeachment for waste, gives him liberty to do: *Aston v. Aston*, 1 Ves. 266; and see *Coffin v. Coffin*, Jac. 72.

A tenant in tail after possibility of issue extinct, although unimpeachable of waste at law (*Lewis Bowles' case*, 11 Co. 79; *Williams v. Williams*, 15 Ves. 428; 12 East, 209, is within the principle of equitable waste, and will be restrained from committing malicious or extravagant waste, such as cutting down ornamental timber, and pulling down houses. "The common case," observes Sir John Leach, "of a tenant in tail after possibility of issue extinct, is where the estate is descendible to the issue of the wife alone. Until the death of the wife without issue, this estate has all the legal incidents of other estates tail; but upon the death of the wife without issue, the estate has no longer a descendible quality, and the husband's interest is, in effect, limited to his life. His estate becomes ranked in the law amongst estates for life, and he may make exchange with a mere tenant for life. In *Lewis Bowles' case* (11 Co. 79), however, it was held at law, that, as he had, before the death of his wife, an estate tail, and was once owner of the timber, that, notwithstanding the death of his wife, and the change in the quality of his estate, he should still continue unimpeachable of waste. In a Court of law therefore, a tenant in tail after possibility of issue extinct, is, in effect, a tenant for life without impeachment of waste; and Courts of equity have, in the question of equitable waste, confounded him with other tenants for life without impeachment of waste, and have not entered into the distinction that he is unimpeachable of waste, not by the provision of the grantor, but as a legal incident to his estate;" *Attorney-General v. Duke of Marlborough*, 3 Madd. 538. See, also, *Abraham v. Bubb*, 2 Show. 69; 2 Freem. 52; 2 Eq. Ca. Ab. 757; 2 Swanst. 172; *Anon.*, 2 Freem. 278; *Cooke v. Whalley*, 1 Eq. Ca. Ab. 400.

In equitable as in legal waste, if one act of waste be established, the Court will restrain equitable waste generally: *Coffin v. Coffin*, 6 Madd. 17.

There does not appear to be any settled form of inquiry as to what is ornamental timber applicable to all cases, for the question to what extent ornamental timber may be cut, must, it seems, depend upon the circumstances of each particular case, and the proper inquiry to be directed must vary accordingly. For instance, in some cases a wood may have been dedicated by the absolute owner for the purpose of ornament and shelter only; in others it may *have been so dedicated, subject [*758] to its being used in the first place for the purpose of repairs, or

even sale; and the form of inquiry would necessarily differ in each of these cases. See *Ford v. Tynte*, 2 De G. Jo. & Sm. 127, 134, and the form of inquiry there given, and the observations thereon; see *Halliwell v. Phillips*, 4 Jr. (N. S.) 607; see *Wombwell v. Belasyse*, 6 Ves. 110, n.

The orders to restrain equitable waste by the destruction of timber planted for shelter or ornament, or of too young growth, are generally drawn up in the terms used in *Chamberlayne v. Dummer*, viz., "that an injunction be awarded to restrain the defendant, Harriet Dummer, her servants, workmen, and agents, from cutting down any timber and other trees growing on the estate in question, which are planted or growing there for the protection of shelter of the several mansion-houses belonging to the said estate, or for the ornament of the said houses, or which grow in lines, walks, vistas, or other grounds thereunto belonging; and that the injunction do also extend to restrain the said defendant, her servants, workmen, or agents, from cutting down any timber or other trees, except at seasonable times, and in a husbandlike manner; and also from cutting down saplings or young trees not fit to be cut, as and for the purposes of timber, until the hearing of this cause, or further order of the Court."—Reg. Lib. A., 1781, fol. 452.

Where there has been a trust or restriction created for the preservation of ornamental timber, the Court will endeavor to enforce it, as it is not like a trust for purposes of benevolence, as to which the objects are unlimited and no standard can be found: *Marker v. Marker*, 9 Hare, 1, 18, 20.

But a Court of equity will not interfere with an ordinary tenant in tail, who may, at his pleasure, cut down all timber for whatever purpose planted, or pull down all buildings upon his estate; for, as observed by Sir John Leach, V. C., "With the exception of alienation, including leases, unless according to the statute, a tenant in tail is at this day to be considered as much the absolute owner of the estate as a tenant in fee simple, and, as such, may do what he pleases with the buildings and timber on the estate;" *Attorney-General v. Duke of Marlborough*, 3 Madd. 532; *Saville's case*, cited ante, p. 13.

It seems that tenants in tail, restrained by statute from barring their issue, or those in remainder with reversion to the Crown, are not, on that account, within the principle of equitable waste; for, to use the words of Sir John Leach, V. C., "They have all the legal rights and incidents which belong to an estate of this character, except where such [*759] rights and incidents are specially qualified by the provisions of the statute, and there being no qualification with respect to the right of cutting timber, they are as much the legal owners of the timber as if they were tenants in fee simple. . . . No instance can be stated in which a Court of equity has ever interfered against such a tenant in tail, upon the principle of equitable waste." See *Attorney-General v. Duke of Marlborough*, 3 Madd. 498, 536, 539. However,

his Honor in that case held, on demurrer, that the Duke of Marlborough for the time being is, under the Act 5 Anne, c. 3, bound to maintain Blenheim-house for the future residence of those to whom the succession was limited, and that the Court was bound to interfere to prevent the destruction of the house, and of the ornamental timber about it. "I am clearly of opinion," said his Honor, "that the Duke of Marlborough, having no power of destruction over the house, has no power of destruction over timber which is essential to the shelter or ornament of the house, and I must overrule a demurrer which, in effect, insists upon an absolute and unqualified right to cut all timber."

One important objection taken in *Garth v. Cotton* was this, that, although it was admitted a bill might have been maintained by the trustees to preserve contingent remainders, to stay waste before it was committed, yet it did not follow from thence, that after that was over, a bill might be brought for an account; and it was argued, that the jurisdiction of the Court to decree an account of the value of the timber was only incident to the jurisdiction of granting an injunction. In the previous case of *Jesus College v. Bloome*, 3 Atk. 262, Amb. 54, where a bill was brought solely to have an account and satisfaction for waste in cutting down trees and carrying off stones, against the defendant, an assignee of the lessee of the college, after an assignment of the term, and for waste done before assignment, Lord Hardwicke, C., according to the reports, dismissed the bill with costs, although he himself says, in *Garth v. Cotton*, that it was dismissed without costs. "The first question," said his Lordship, "is whether bills are to be maintained in this Court, merely for timber cut down after the term is gone out of the tenant by assignment? or whether such bills can only be brought for an account of such waste done, without, at the same time, praying an injunction? and I am of opinion that they cannot. Waste is a loss for which there is a proper remedy by action. In a Court of law the party is not necessitated to bring an action of waste, but he may bring trover; those are the remedies, and therefore there is no ground of equity to come into this Court, for satisfaction of damages is not the proper ground for the Court to *admit of these [*760] sorts of bills, but the staying of waste, because the Court presumes, when a man has done waste he may commit the same again, and therefore will suffer the lessor or reversioner, when he brings his will for an injunction to stay waste, to pray, at the same time, an account of the waste done; for, though a Court of law may give damages, yet it cannot prevent further waste: and it is upon this ground, to prevent multiplicity of suits, that this Court will decree an account of waste done, at the same time with an injunction; just like the case of a bill brought for discovery of assets, an account may be prayed at the same time; and though originally the bill was only brought for a discovery of assets, yet to prevent multiplicity of suits, the Court will direct an

account to be taken." So in *Smith v. Cooke* (3 Atk. 381), Lord Hardwicke, C., took the same distinction. He said, that "after the estate of the lessee is determined, and a new lessee is in possession, a person, merely for an account of timber felled by way of wrong, could not come into a Court of equity. But where the person continues in possession, and, consequently, in a condition of committing more waste, there it is proper for a person to come into equity for an injunction to stay waste;" and though the plaintiffs in that case had not actually moved for an injunction, his Lordship held that they might reserve that relief till the hearing of the cause, if they thought proper, as it was incident to their estate, and they were entitled to an account for such waste.

Now, the case of *Garth v. Cotton* differs materially from *Jesus College v. Bloome*: because, in the latter, there was clearly a remedy at law by trover; in the former, there was no remedy at law, and unless an account had been granted, a great wrong would have been done to the plaintiff, and he would have been without remedy.

The view taken by Lord Hardwicke, in *Jesus College v. Bloome*, has been recognised in many later cases. See *Pultney v. Warren*, 6 Ves. 89; *Grierson v. Eyre*, 9 Ves. 346; *Richards v. Noble*, 3 Mer. 673; *Higginbotham v. Hawkins*, 7 L. R. Ch. App. 676.

In *Lee v. Alston*, 1 Bro. C. C. 194; 3 Bro. C. C. 37; 1 Ves. jun. 78; Lord Thurlow, indeed, acted contrary to the doctrine laid down by Lord Hardwicke in *Jesus College v. Bloome*; for, admitting that trover would lie at law for the timber felled by the tenant for life, who was still in possession, yet he granted the account, although an injunction was not prayed. "I have no doubt," said his Lordship, "an action of trover might be maintained. What I meant when the cause came on before was this:—Suppose they come for a discovery and an account, and that a discovery is made accordingly, I should agree that the plaintiffs ought to be satisfied with *it; but the admission that some has been wrongfully cut, gives them a right to an account of that. . . . My present opinion is, that if any timber has been cut from the estate, where there was no right to cut any, that circumstance gives a right to the account. If you can make out that the plaintiff has no right to come here, but ought to be left to law, I will turn round her bill, because she has not brought an action: but I thought the circumstance of timber having been wrongfully cut down, entitled her to the account, as in the case of a bailiff—if a man enters upon another's lands, and makes money of his property, he will be considered as a bailiff, and must account." See *Bagot v. Bagot*, 32 Beav. 509.

Where mines are opened, an account, it seems, will in all cases be granted, although no injunction is asked: *Bishop of Winchester v. Knight*, 4 P. Wms. 406; and in *Jesus College v. Bloome*, Amb. 55, Lord Hardwicke says, "The Court always distinguishes between dig-

ging of mines and cutting of timber, because the digging of mines is a sort of trade."

As to the question whether a tenant for life impeachable for waste may open a dormant or abandoned mine, see *Bagot v. Bagot*, 32 Beav. 509, 517.

In *Parrot v. Palmer*, 3 My. & K. 632, where it was argued that, as there could be no injunction, there could be no account, Lord Brougham entered into an elaborate examination of the authorities. "It may be laid down generally," observed his Lordship, "that, unless in the case of mines, the rule is, no injunction—no account." In *Jesus College v. Bloome*, 3 Atk. 262, where an account was prayed of timber cut by a tenant before the assignment of his lease, and the term being gone, no injunction could be had, the Court held that no account lay; and so it was decided, though the Court said obiter, that mines formed an excepted case, being in the nature of a trade or business. In *Whitfield v. Bewet*, 2 P. Wms. 240, where an account of timber cut, and an injunction against opening mines, were prayed, the Court appears to have given the account only as incident to a discovery. Indeed, in *Sayer v. Pierce*, 1 Ves. 232, which was a case of mines, but where no possession had been shown by the plaintiff, Lord Hardwicke would only entertain the suit in respect of the confusion of boundaries, and he retained the cause for a year, with liberty to bring ejectment. In *Garth v. Cotton*, Lord Hardwicke takes a somewhat different view of his own judgment in *Jesus College v. Bloome*, from that which the report of the case gives, but he does not overthrow his doctrine: for *he takes the broad distinction, that in the one case there was a legal remedy, *and in the other no remedy at all.* But it is certain, [*762] that if *Lee v. Alston* be law, the distinction formerly taken, particularly in *Jesus College v. Bloome*, is shaken, if not overthrown, and a principle established—that wherever timber is cut on the estate by one not having right, account will lie, because, to use Lord Thurlow's expression, the wrong-doer may be treated as a bailiff. And yet Lord Thurlow assumes throughout, that there is all the while a remedy at law. It must, however, greatly detract from the weight of a doctrine so decidedly opposed to the distinct and sensible opinion of Lord Hardwicke, in *Jesus College v. Bloome*, that, neither in the two reports of Lord Thurlow's judgment, when the case was last before the Court (3 Bro. C. C. 37, and 1 Ves. jun. 78), nor in the year 1779 (1 Bro. C. C. 194); when it was formerly heard, is there the least mention made of that celebrated case, nor, indeed, of *Sayer v. Pierce*." See *Powell v. Aiken*, 4 K. & J. 343; *Wright v. Pitt*, 12 L. R. Eq. 408.

It is, however, clear, that, in cases of equitable waste, an account will be granted without an injunction. See *Duke of Leeds v. Earl of Amherst*, 14 Sim. 357, 367; *S. C.*, 2 Ph. 117, and cases there cited.

Although an account will be granted against a tenant for life with-

out impeachment of waste who pulls down a mansion-house and sells the materials (*Duke of Leeds v. Earl of Amherst*, 14 Sim. 357; 2 Ph. 117), it will, it seems, be refused where the materials of the old house are used in building a new house. See *Morris v. Morris*, 3 De G. & Jo. 323: there a tenant for life without impeachment for waste pulled down the mansion-house, and built a better in a more desirable situation upon another part of the settled estates. After his death the persons entitled in remainder filed a bill to obtain compensation for the pulling down the old house. It was proved that the bulk of the materials of the old house had been employed in building the new one, and there was no evidence that any part of the materials had been sold. It was held by the Lords Justices, affirming the decision of Sir John Stuart, V. C. (6 W. R. 427), that the bill had been rightly dismissed. "I do not," said Lord Justice Turner, "rest my decision in this case upon the fact of the estate having been improved by the building of the new mansion-house and the pulling down of the old one; for I am not at all satisfied that the question of improvement or no improvement is one by which the Court ought to be guided. I apprehend that the principle upon which the Court proceeds in these cases is, that the tenant for life of an estate is liable to account in equity for profit derived by him from an improper use of his legal powers, *in [763] committing equitable waste. If, therefore, the materials of this house had been sold, and the deceased tenant for life had received the proceeds, in my opinion this would have been a case for an account. But all that can be said in the present case, as to any benefit that has been derived by the deceased tenant for life, is this—that he enjoyed the use of the materials of the old house during his life, in a different state from that in which they originally existed on the estate. They remained on the estate, but they remained as materials attached to a new house, and not to the original house to which they were formerly attached; and I do not find any evidence in the case that there has been any sale of the materials, or any other profit derived by the tenant for life, than by the enjoyment of the materials in an altered state. I think that such enjoyment is not the subject of an account of profits, but that the right to such an account arises only where the tenant for life has disposed of the materials and received the profits."

Upon the whole, we may conclude, that, in the case of timber, where there is a remedy *at law* for waste, an account will not be granted, except as incident to an injunction. Where, as in *Garth v. Cotton*, the remedy lies solely *in equity*, an account will be granted, although there is no injunction. But with regard to waste in mines, although there may be a remedy *at law*, an account will be granted independent of an injunction.

In an action of trover, a person will obtain the value of the timber,

in equity he must take the account as it lies, unless there is some special case to vary the terms of it: *Lee v. Alston*, 1 Ves. jun. 82.

Where by act of God, as a tempest, or by act of man as by a trespasser, or by waste of tenants, things are severed from the inheritance while a tenant for life impeachable for waste is in possession, whether they are materials of a house, timber, or the produce of mines, they will become at once the property of the owner of the first estate of inheritance in esse, whether in fee, or tail (*Uvedall v. Uvedall*, 2 Roll. Ab. 119), even although there may be an intervening estate of freehold in a tenant for life without impeachment of waste; *Pigot v. Bullock*, 1 Ves. jun. 484; *Gent v. Harrison*, Johns. 517, 524.

But this, it seems, will not be the case, where the waste is committed by the tenant for life: see *Bagot v. Bagot*, 32 Beav. 523. There Sir John Romilly, M. R., says, "I by no means assent to the doctrine supposed to be laid down by some of the cases, but as I conceive erroneously so supposed, that if an estate be limited to several persons for life, in succession, with several successive estates tail to *their first and other sons in succession, and the first tenant for life [*764] commits waste without collusion with any one, the money arising from the sale of the inheritance wasted would belong to the eldest son of the last tenant for life, because he happened to be the only tenant in tail then in existence, and that he could thereby deprive all the future sons of the prior tenants for life, who should be afterwards born, of the inheritance settled on them. If the prior tenant for life could do this, as to a portion, the principle would equally apply to the whole, and he might, provided there was no collusion with the tenant in tail in esse, give an estate or a valuable part of it to a remote descendant, to the exclusion of many children, who, in the ordinary course of nature, would afterward come into existence. I do not think that this proposition is intended to be laid down in any of the cases referred to, and I am unwilling to do anything which might lead to the supposition that I considered this to be the law."

Where a tenant for life who has committed waste owns the first existent estate of inheritance, subject to intermediate contingent remainders, he will not be allowed to claim the benefit of the timber, as that would enable him to take advantage of his own wrong: *Williams v. The Duke of Bolton*, 3 P. Wms. 268 n.; *Powlett v. The Duchess of Bolton*, 3 Ves. 374; *Marquis of Ormond v. Kynnersley*, 7 L. J. O. S. (Ch.) 150, 154, 155; *Bagot v. Bagot*, 32 Beav. 509; *Seagram v. Knight*, 2 L. R. Ch. App. 628.

It has, indeed, been laid down by Sir John Romilly, M. R., that "where by act of God a large quantity of timber is blown down by a storm, the produce is to be laid out in the purchase of stock, and the interest of the fund is to be paid to the successive tenants for life," 15

Beav. 7. See also *Bateman v. Hotchkin*, 31 Beav. 486; but this seems to be opposed to the older authorities.

It may here be noticed that it has been held, as between tenant for life and remainder-man, that the thinnings of fir trees under twenty years of age (*Pidgeley v. Rawling*, 2 Coll. 275), and indeed all fair and proper thinnings, and all coppices cut periodically in the nature of crops (*Bateman v. Hotchkin*, 31 Beav. 487; *Gordon v. Woodford*, 27 Beav. 603), belong to the tenant for life. The tenant for life is also entitled to have the benefit arising from the sale of all such trees thrown down by the wind as he would be entitled to cut himself (*Bateman v. Hotchkin*, 31 Beav. 486; *Bagot v. Bagot*, 32 Beav. 509, 518); and also from the sale of gravel dug and taken from the waste land of a manor; *Earl Cowley v. Wellesley*, 1 L. R. Eq. 656, 659, and also from the sale of turf taken from the land for the purpose of improving it; *Harris v. Ekins*, 26 L. T. R. (N. S.) 827; 20 W. R. (V. C. B.) 999.

[*765] *Where tenant for life impeachable for waste, is in possession, the Court will order trees in a state of decay, or which will not improve by standing, or the standing of which is injurious to the others, to be felled, upon the ground, that the interest of the succession requires it, and will direct the interest of the proceeds to be paid to the tenant for life, though impeachable for waste (see *Tooker v. Annesley*, 5 Sim. 235, and cases there cited; *Toolemache v. Toolemache*, 1 Hare, 456; *Ferrand v. Wilson*, 4 Hare, 381): a dowress being entitled to one-third of the income (*Bishop v. Bishop*, 5 Jur. 931; 10 L. J. N. S. Ch. 302; *Dickin v. Hamer*, 1 Drew. & Sm. 284, in which case the right of a dowress in mines opened after her husband's death was discussed but not determined); and the capital to be transferred to the first owner of the inheritance or the first tenant for life; without impeachment of waste; *Waldo v. Waldo*, 12 Sim. 107; *Phillips v. Barlow*, 14 Sim. 263; and as the timber-money will be considered as realty, on the death of a tenant in fee first owner of the inheritance, if he has done nothing to convert it into personalty, his heir will be entitled to it in preference to his personal representatives: *Field v. Brown*, 27 Beav. 90.

The rule is the same where a trustee has felled timber and the Court has adopted his act: *Waldo v. Waldo*, 12 Sim. 107, 112; *Gent v. Harrison*, Johns. 517, 523; *Earl Cowley v. Wellesley*, 1 L. R. Eq. 656; 35 Beav. 635; *Seagram v. Knight*, 2 L. R. Ch. App. 630.

The Court will not, upon the application of a tenant for life, impeachable for waste, order timber to be cut, merely because it is ripe for cutting, unless it is also decaying or injuring the growth of other timber: *Seagram v. Knight*, 2 L. R. Ch. App. 628; *S. C.*, 3 L. L. Eq. 398; *Hussey v. Hussey*, 5 Madd. 44.

Where timber has been cut by order of the Court during the life of an equitable tenant for life, unimpeachable of waste, he will be entitled

to the sum produced by the sale of his timber: *Lord Lovat v. The Duchess of Leeds*, 2 Drew. & Sm. 75.

If a tenant for life unimpeachable for waste (*Rolt v. Lord Somerville*, 2 Eq. Ca. Ab. 759; *Marquis of Ormond v. Kynnersley*, or *Butler v. Kynnersley*, 7 L. J. O. S. (Ch.) 150; 8 L. J. O. S. (Ch.) 67; *Wellesley v. Wellesley*, 6 Sim. 497; *Lushington v. Boldero*, 15 Beav. 1), or his assignees in bankruptcy, (*Lushington v. Boldero*, 15 Beav. 1) should fell ornamental timber, the proceeds will belong to the person having the first vested estate of inheritance; and parties having intervening estates for life have no right to an account of the timber so cut, to have such proceeds invested upon the same trusts with the lands.

*In a recent case, however, the Court refused to allow a fund arising from equitable waste to be paid to a son of a tenant for life in remainder, who, subject to the death of the first tenant for life, without issue, and the life interest of his father, was entitled to the inheritance as tenant in tail. The grounds for this decision appear to have been that the point in the cause could not be decided in the absence of any of the parties interested, and as it could not be said, that the issue of the first tenant for life had no possible interest in the fund during the life of the first tenant for life, the case was not ripe for decision: *Lushington v. Boldero*, 13 Beav. 418.

But if the Court were to order ornamental timber to be cut, as for instance, if in consequence of its proximity to a house, it causes it to be unhealthy, it is presumed that by analogy to the cases where ordinary timber is felled by the order of the Court, the Court would direct the interest to be paid to each tenant for life in succession, and the capital to the first owner of the inheritance, or the first tenant for life without impeachment of waste.

Where an account of equitable waste committed by a tenant for life was directed to be taken against his executors, which it was found impossible to take accurately, and the Master had arbitrarily charged the executors, his report was supported upon the general principle that where a wrong has been committed, the wrong-doer must suffer from the impossibility of accurately ascertaining the amount of the damage: *The Duke of Leeds v. The Earl of Amherst*, 20 Beav. 239.

Although the Court of Chancery will grant an injunction to restrain a tenant for life from cutting down ornamental timber, irrespective of the question whether or not any damage would be occasioned to the inheritance by such cutting; yet, when the ornamental timber has been actually felled, and the reversioner claims damages from the tenant for life in respect of such equitable waste, the amount of damages can only be measured by the damage done to the inheritance. See *Bubb v. Yelverton*, 10 L. R. Eq. 465, in which case, under the circumstances, no damages were awarded.

A rector or vicar is in the same position as an ordinary tenant for

life, and has no right to fell timber except for necessary repairs to the vicarage-house, buildings, and premises: *Duke of Marlborough v. St. John*, 5 De G. & Sm. 174, but not for the purpose of making a general repairing fund: *Sowerby v. Fryer*, 8 L. R. Eq. 417, 422. And he may, perhaps, have a right to dispose of timber, and apply the proceeds in getting some other timber for repairs at a more convenient place. *Ib.* For it would be absurd to make a man who has cut down timber on an [*767] estate, drag that *self-same timber the whole distance to the spot—it may be half a dozen or ten miles off where it is wanted. For it will come to the same thing whether he uses the specific timber he has cut upon the woodwork repairs, or whether he sells it and buys other timber of equal value to be applied for the same purpose. *Ib.* And see *Wither v. Dean and Chapter of Winchester*, 3 Mer 421, 426; *Knight v. Mosely*, Amb. 176.

And it seems that not only may the patron of a living file a bill against a rector or vicar for an injunction to restrain the improper felling of timber, but notwithstanding the remarks in *Knight v. Mosely*, Amb. 176, and *Holden v. Weeks*, 1 J. & H. 278, he may file a bill against them for an account of the proceeds of timber improperly felled, in order that they may be invested for the benefit of the advowson: *Sowerby v. Fryer*, 8 L. R. Eq. 423; at any rate it is clear that where the timber has been improperly felled, but not sold by the rector or vicar, the patron may obtain an order from the Court that the timber may be sold, and the proceeds brought into Court. *Ib.*

And it appears that the ordinary may take proceedings to prevent waste by collusion between the patron and the incumbent: *Holden v. Weeks*, 1 J. & H. 278.

The remedy for waste may not only be barred by the Statute of Limitations (*Seagram v. Knight*, 2 L. R. Ch. App. 628), but independent of that statute lapse of time in equity may be a bar to an account for waste. Thus where a tenant for life in remainder filed a bill against the representatives of a prior tenant for life who had been dead nearly twenty years, seeking an account of timber improperly cut by him, the bill was dismissed with costs on account of the delay; *Harcourt v. White*, 28 Beav. 303. And after a long delay in taking proceedings against a tenant for life in respect of waste, it seems the Court endeavours to deal liberally towards him; *Bagot v. Bagot*, 32 Beav. 509. And as to time from which interest is chargeable against a tenant for life who commits waste, see *Ib.*

It seems that a claim in equity against the estate of a deceased tenant for life, who was also owner of the first inheritance, for acts of waste committed by him, first arises at the death of such tenant for life, and must be made within six years from that date: *Birchwolfe v. Birch*, 9 L. R. Eq. 683; and see *Higgenbotham v. Hawkins*, 20 W. R. (V. C. B.) 588. Varied by decision of the Lords Justices, reported 7 L. R. Ch.

App. 676, which decides that where a tenant for life, impeachable for waste, who fells timber, is not also owner of the first inheritance, the Statute of Limitations begins to run against the remainder-man in fee, from the time when the timber was cut, and not from the death of the tenant for life.

As to acquiescence in waste, see *Duke of Leeds v. Earl of Amherst*, 2 Ph. 117.

The old action by writ of waste, which had fallen into disuse, was at length abolished by 3 & 4 Will. 4, c. 27, s. 36.

[Waste is an injury to the freehold by one who is rightfully in possession. This marks the distinction between waste, and a trespass by a stranger to the title. They pass into each other by insensible degrees, and it is not easy to say whether a spoliation of the land by a mortgagor, or a vendee in possession under a contract, should be termed waste or trespass. Injunctions to stay waste seem to have been granted in the first instance, where the complainant could not from the nature of his interest, maintain an action; *Moore*, 554, 1 Spence's Equitable Jurisdiction, 671. From this the transition was easy to cases where a recovery in damages would be inadequate; and the jurisdiction was finally extended to trespasses; *Mitchell v. Dorrs*, 6 Vesey, 147; *Moore v. Ferrell*, 1 Georgia, 71. Whether the injury be waste or trespass, the test is, can the injured party have a full and complete remedy at law? *Clark's Appeal*, 12 P. F. Smith, 447, 450; *Cooper v. Hamilton*, 8 Blackford, 397; *Gause v. Perkins*, 3 Jones' Equity, 177. The difference in this regard between waste and trespass, is one of cir-

cumstances rather than principle. There may be more reason to apprehend a repetition of the injury where it proceeds from a tenant, but this can hardly be said when the wrong is done by a third person under a pretence or color of right; *Lowndes v. Bettle*, 33 Law Journal Ch. 451. A chancellor may, therefore, restrain acts tending to the injury of the freehold, at the suit of a complainant in possession, without pausing to determine whether he or the respondent has the better title; *Lowndes v. Bettle*; *Carpenter v. Gruninger*, 25 Barb. 395.

It is accordingly well settled, that the preventive power of a chancellor may be exercised where there is reason to apprehend a great or irreparable injury, which does not admit of a pecuniary compensation. The complainant must establish the gravity of the injury, and that he has sufficient cause for believing that it will be inflicted; and it is not enough to show that a wrongful act has been done, and may be repeated unless the wrong doer is enjoined; *Stevens v. Beekman*, 1 Johnson, Ch. 318. But, an injunction should not be withheld where it appears

from the language or conduct of the person against whom relief is sought, that he is about to adopt a course tending to the impoverishment of the inheritance, or that must result in a loss which he may be unable to make good; *Livingstone v. Livingstone*, 6 Johnson's Ch.; *Siple v. Rutter*, 7 Maryland, 408; *Mason's Appeal*, 17 P. F. Smith, 26; *Jerome v. Ross*, 7 Id. 315; *Ameling v. Seekamp*, 9 Gill & J. 474; *White v. Flanigan*, 1 Maryland, 525; *Green v. Keen*, 4 Id. 98. Ordinarily a chancellor does not intervene to restrain a trespass which admits of pecuniary compensation; *Wergel v. Walsh*, 45 Missouri, 560; *Van Winkle v. Curtis*, 2 Green's Ch. 422. But the rule is not unbending, and relief may be accorded where, from the insolvency of the defendant or other causes, a judgment for damages would be illusory or worthless; *Ricks v. Compton*, 18 California, 206; *Musselman v. Marquis*, 1 Bush, 463. See *Gause v. Perkins*, 3 Jones' Eq. 177.

The authorities touching the jurisdiction of equity in this regard, are collected in the following extract from the opinion of Chancellor Kent in *Livingstone v. Livingstone*, 6 Johns. Ch. Rep. 497, 499, 500. "In *Mitchel v. Dors*, 6 Ves. 147, the defendant in the process of taking coal, had begun to work into the land of the plaintiff, and though this was strictly a trespass, yet the injunction was granted, because irreparable mischief would be the consequence if the defendant went on. In *Ham-*

ilton v. Worsfold, and in *Courthorpe v. Mapplesden*, 10 Vesey, 290, and note *Ibid*, injunctions were granted against a trespasser entering with permission, or by collusion with the tenant, and cutting timber. Lord Eldon repeatedly suggested the propriety of extending the injunction to trespasses, as well as waste, and on the ground of preventing irreparable mischief, and the destruction of the substance of the inheritance. The distinction on this point between waste and trespass, which was carefully kept up during the time of Lord Hardwicke, was shaken by Lord Thurlow in *Flamang's Case*, respecting a mine, and seems to be almost broken down and disregarded by Lord Eldon. This protection is now granted in the case of timber, coal, lead, ore, quarries, &c., and the present established course, as he observed in *Thomas v. Oakley*, 18 Vesey, 184, was to sustain the bill for the purpose of injunction, connecting it with the account in both cases, and not to put the plaintiff to come here for an injunction, and to go to law for damages.

The injunction was granted in *Crawford v. Alexander*, 15 Ves. 138, against cutting timber, where the defendant had got possession under articles for a purchase; and in *Twore v. Twore*, 16 Vesey, 128, against cutting timber between tenants in common; and in *Kender v. Jones*, 17 Vesey, 110, where the title boundary was disputed; and in the case of *Carl Cowper v. Baker*, 17 Vesey, 128,

against taking stones of a peculiar and valuable quality, at the bottom of the sea, within the limits of a manor; and in *Gray v. Duke of Northumberland*, 17 Vesey, 281, against digging coal upon the estate of the plaintiff; and in *Thomas v. Oakley* (*ubi supra*), against exceeding a limited right to enter and take stone from a quarry. In all these cases the injury was considered a trespass, and in two of them it was strictly so, and the principle of the jurisdiction was to preserve the estate from destruction."

It is well settled, in accordance with these principles, that where the nature of the threatened injury is such, that if it be once accomplished, the property cannot be restored to its original condition, a chancellor may restrain the wrong doer, instead of leaving the injured party to the tardy and precarious remedy of a suit for damages. An injunction will accordingly be issued to prevent the use of a party wall without pre-payment (*Masson's Appeal*, 17 P. F. Smith, 26); and the principle is the same where a railway company is about to enter upon and occupy the land of the complainant, under an authority conferred by an Act of Assembly, which does not provide any appropriate or sufficient means of compensation; *Bonaparte v. The Camden and Amboy R. R.*, Baldwin, 205; *Jarden v. The Philadelphia, W. & B. R. R. Co.*, 3 Wharton, 502.

In like manner, tearing down the wall of the complainant's house on the pretence that it encroaches

on the defendant's land, is a gross and irreparable wrong which a Chancellor will prevent. *De Veney v. Gallagher*, 5 C. E. Green, 33; and so is the removal of fixtures which are essential to the enjoyment of the inheritance; *Witmer's Appeal*, 9 Wright, 455. In *Witmer's Appeal*, the defendant in a judgment was enjoined from dismantling a steam saw mill, by taking down the engine and boilers and exposing them for sale to the prejudice of the lien creditors. But the severance and removal of a refrigerator, carving table and range from a hotel, does not fall within the principle, because the loss is not irreparable, or one that money will not replace.

The destruction of trees which have been planted for shade or ornament, or which are useful as affording a supply of timber, is clearly within this rule; *Daubenspeck v. Greer*, 18 California, 443; *Hicks v. Compton*, *Ib.* 443. The wrong doer may not be able to respond in damages, and if he is, money will not replace what he has destroyed. An injunction may accordingly be granted under these circumstances, whether the injury is threatened by a tenant or by one who is wholly without right; *Livingstone v. Livingstone*, 6 Johnson's Ch. 497. In *Hawley v. Clowes*, 2 Johnson's Ch. 122, a tenant in common was enjoined at the instance of the co-tenant from felling more timber than was requisite for the uses of the farm.

The intrinsic value of the wood cut down, as such, is not necessarily the criterion, nor whether the

market price of the premises will be lessened by the change, because the removal of a few trees may impair the beauty of a prospect, or deprive a house or field of shade; *Sarles v. Sarles*, 3 Sandford Ch. 6. The owner is entitled to use his estate as a dwelling-place, or to maintain it as a farm, and it is not an answer that the land will yield a larger revenue when converted into building lots than in its present form. So where the acts complained of, though reparable, are repeated in a way to indicate that it is the intention of the wrongdoer to persist, equity may intervene in order to prevent a multiplicity of suits. In *Carpenter v. Garigan*, 35 Barb. 395, the respondent entered repeatedly, and tore down the plaintiff's fences, on the pretence that the land had been dedicated to the public, and the case was held to be one for equitable relief.

The case is nearly if not quite the same where the injury consists in the excavation and removal of stone, coal or ore, and a Chancellor may properly interpose to prevent the wrong, instead of leaving the complainant to seek a remedy through a judgment for damages, which may never be paid; *The West Point Iron v. Co. Reynert*, 45 New York, 705. This head of jurisdiction is favored in view of the irreparable nature of the injury, and will be liberally exercised where there is no countervailing equity; *Mirced v. Fremont*, 7 Cal. 317; *Anderson v. Harvey*, 10 Grattan, 386; see *Real v. Pond*, 23 California, 82. A well founded allega-

tion that the defendant is about to enter on the plaintiff's land and quarry and remove asphaltum, is, therefore, a sufficient ground for issuing an injunction; *Moore v. Masson*, 32 Cal. 590. So where a stream is wrongfully diverted from the complainant's mill, equity may compel the restoration of the water to its accustomed channel, although a legal remedy might be had through an action on the case for damages; *Noel v. Filling*, 40 New York, 191. In *Marshall v. Peters*, 12 Howard, N. Y., it was held that the authorities did not warrant the granting an injunction to prevent the wrongful cutting and exportation of ice from the complainant's pond, because such an injury does not permanently affect the inheritance, ice being a crop which each winter may renew.

Where, however, the injury appears on examination to be trivial, and the insolvency of the alleged wrong doer is not averred, equity will remit the complainant to his remedy at law; *ante*; *Gentel v. Arnauld*, 1 Sweeny, 641. In *Hurr v. Burbower*, 3 Maryland Ch. 456, the chancellor said that if the respondent had, as the bill set forth, entered on the complainant's land for the purpose of laying the foundation of a wall which would materially interfere with the free access to and enjoyment of the premises, it would have been his duty to arrest the commission of the wrong; but that as it appeared from the answer that the injury was limited to the erection of a fence, which might easily be taken down, the injunction which

had been issued must be dissolved. So in *Amelung v. Seekamp*, 9 Gill. & J. 474, it was held to be insufficient to allege that the respondent was felling the trees on complainant's farm, without showing that the timber was marketable, or that the act complained of would be prejudicial to the inheritance by leaving it without an adequate supply of wood for fuel, and to maintain the fences. This decision was acted and followed in *Green v. Keen*, 4 Maryland, 98; and it is well settled that the burden of allegation and proof is on the complainant, to show the goodness of his title, the gravity of the injury, and that an action for damage would not afford a full or adequate redress; *Green v. Perkins*, 3 Jones' Eq. 177; *West v. Walker*, 2 Green, Ch. 279; *Cornelius v. Post*, 1 Stockton, 196.

In *Jerome v. Ross*, 7 Johnson, Ch. 333, the injunction was refused, because it did not sufficiently appear that the respondent was acting without right, or that the injury would be irremediable; and the judgment of the chancellor may be consulted with advantage, as being the converse of that pronounced in *Livingstone v. Livingstone*: "The objection to the injunction, in cases of private trespass, except under very special circumstances, is, that it would be productive of public inconvenience, by drawing cases of ordinary trespass within the cognizance of equity, and by calling forth upon all occasions its power to punish by attachment, fine, and imprisonment, for a further commission of trespass, in-

stead of the more gentle common law remedy by action, and the assessment of damages by a jury. In ordinary cases, this latter remedy has been found amply sufficient for the protection of property; and I do not think it advisable, upon any principle of justice or policy, to introduce the chancery remedy as its substitute, except in strong and aggravated instances of trespass, which go to the destruction of the inheritance, or where the mischief is remediless. This was the opinion and doctrine which I had occasion to declare in the case of *Stevens v. Beekman*, 1 Johns. Ch. Rep. 318, and it appears to be the English doctrine, and the practice of this court has been in conformity to it. I do not know a case in which an injunction has been granted to restrain a trespasser, merely because he was a trespasser, without showing that the property itself was of peculiar value, and could not well admit of due recompense, and would be destroyed by repeated acts of trespass. In ordinary cases, the damages to be assessed by a jury will be adequate for a check and for a recompense. Every man is undoubtedly entitled to be protected in the possession and enjoyment of his property, though it may be of no intrinsic value. He may have on his land a large mound of useless stone or sand, which he may not deem worth the expense of enclosing, and yet it would be trespass for any person to remove any portion of the stone or sand without his consent; and he would be entitled

to his action, even though the damages were nominal. But would it be proper for this court to assume cognizance of such a trespass, and lay the interdict of an injunction upon it? I apprehend not."

Several cases have occurred in this court, in which public trustees have been restrained by injunction from acts of trespass, but the acts were such as went to destroy the enjoyment of valuable property and privileges. Thus, in the case of *Gardner v. The Trustees of Newburg* (2 Johns. Ch. Rep. 162), the trustees were going to divert a stream of water that had flowed immemorially, and had supplied the brickyard, the distillery, and mill erections of the plaintiff; and the case not being deemed within the provisions of the act in favor of those trustees, an injunction was granted. Afterwards, in *Belknap v. Belknap* (2 Johns. Ch. R. 463), an injunction was allowed upon the same principle, of preventing a great and irreparable mischief. In that case, inspectors, under an act of the Legislature for draining certain swamps and bog-meadows, for the benefit of some individuals, undertook to lower a large pond of four hundred acres, by cutting down the outlet, which would destroy the value of the pond and outlet as a source of water for the use of the mills established on the outlet. It was considered to be an interference not warranted by the statute, and to be a great and special trespass, leading to lasting mischief, and the destruction of the estate. It was further observed, that it was

not a case which concerned the public, but one of mere private convenience and profit, and the act ought to be strictly construed.

These cases all show that, in respect to acts of trespass committed upon land, even by persons in a public trust, under color of law, the court has not interfered by injunction unless where the trespass was permanent as well as grievous or went to destroy the value of the property to the owner. It is not sufficient that the act be simply *per se* a trespass; but it must be a case of mischief and of irreparable ruin to the property, in the character in which it had been enjoyed. In all other cases the common law remedy is deemed to be adequate, and perfectly competent to give compensation, as well as to deter and prevent the repetition of the trespass by the exemplary damages which it will inflict."

The Chancellor, accordingly, refused to enjoin the canal commissioners from quarrying a ledge of rocks on the complainant's land near the Champlain canal, it not appearing that the stone had a pecuniary or marketable value, or that the removal of it would be injurious to the freehold. But the main ground of the decision seems to have been, that the respondents were authorized by act of Assembly, to enter upon any lands contiguous, &c., and to dig for, get, carry away, and use all such stone, gravel, clay, and timber, and other materials as might be necessary and proper in their opinion for the preparation of a canal. The case,

therefore, fell within the well established principle that where the justification is *prima facie* valid, an injunction will not be granted until the question has been determined in the ordinary course of law.

The question is to a considerable extent one of fact as well as law; *Drown v. Smith*, 52 Maine, 141; *Van Syckel v. Emery*, 3 C. E. Green, 387. Clearing wild land may enhance its value, and hence, although technically waste, it is not necessarily a ground for an injunction; *Jackson v. Brownson*, 7 Johnson, 227; *Sufferin v. Townsend*, 9 Id. 35; *Mooers v. Wait*, 3 Wend, 104; *Van Deusen v. Young*, 29 New York, 9, 32. It was said there is an obvious difference between a newly settled country and one that has long been brought under cultivation, and that the English precedents do not necessarily apply in the United States. The jurisdiction of a chancellor is discretionary, and in issuing an injunction he may properly consider the condition of the land, and whether the course adopted by the tenant is at variance with the rules of good husbandry, as practiced in the locality where the premises are situated; *Drown v. Smith*.

It would, notwithstanding, appear that when an act is threatened which will render the freehold not only other than it was, but less, the *prima facies* is in favor of relief; *Dickinson v. Jones*, 36 Georgia, 97. Cutting down forest trees is clearly waste where it materially impairs the value of the inheri-

tance, and that it has this effect should be presumed until the contrary is established; *Dickinson v. Jones*; *De la Croix v. Villeire*, 11 La. Ann. 39; *Davis v. Reed*, 14 Maryland, 152. One who selects a site for his house because it is sheltered by a natural growth, is as much entitled to protection as if he had planted the trees; *Shipley v. Ritter*, 7 Maryland, 408. And it may be said in general, that a chancellor will not readily excuse any act on the part of the holder of a particular estate, which tends to disinherit those who are to succeed him in the enjoyment of the land.

In *Livingstone v. Reynolds*, 26 Wend. 115; 2 Hill, 157, a tenant holding under a lease for life, dug up the soil, felled the standing timber, and used both in manufacturing bricks for sale; and it was held to be waste, which a court of equity should restrain. The contention of the respondent was, that clearing the land and bringing it into cultivation, was a benefit rather than an injury, and therefore could not be considered as waste, while the value of the clay which had been abstracted was too small to justify the interposition of a chancellor. But the court held that it is not pecuniary damage, but disinheritance that constitutes the test of waste. The tenant had excavated and carried away clay from the premises which it was not in his power to restore, and destroyed trees which could not be replaced. This disinherited the reversioner and was waste, whether it did or did not render the premi-

ses less valuable. The respondent avowed his intention to persist in the wrongful course on which he had entered. The complainant was entitled to indemnity for the loss which he had already sustained, and to be made secure in the future. An injunction was accordingly awarded with a decree for an account.

An injunction will not ordinarily be awarded where the defendant flatly denies the complainant's title, or shows good ground for believing that he has the better right; *West v. Walker*, 2 Green, Ch. 279; *Blackwood v. Van Vliet*, 11 Michigan, 252; *Shreeve v. Black*, 3 Green, Ch. 449; *Irwin v. Davidson*, 3 Iredell Eq. 311; *Chesapeake v. Young*, 3 Maryland, 486; *Higgins v. Woodward*, Hopkins, 342. It is a general rule that a chancellor will not interfere to restrain an alleged trespass, unless the complainant had been in undisturbed possession, or has established his title by a suit at law; *Hart v. The Mayor of Albany*, 3 Paige, 213; *Law Journal*, Ch. 45; *Falls v. Tibbetts*, 31 Conn. 165. In *Clark's Appeal*, 12 P. F. Smith, 447, relief was refused on this ground, and because the fixtures which the respondent was about to remove, were not essential to the use or enjoyment of the inheritance. The court may, notwithstanding, in the exercise of a sound discretion; sustain the bill, and grant a temporary injunction to remain until the controversy can receive a legal adjudication; *Keisler v. Clark*, 2 Hill, Ch. 617; *Peake v. Harden*, 3 Bush, 125;

Hicks v. Michael, 15 California, 107; *Beasley v. Cooke*, 13 Texas, 586. A long and undisturbed adverse possession is, moreover, a sufficient ground on which to ask protection against a trespasser, or even against him who has the paper title; *Falls v. Tibbetts*, 31 Conn. 165; *Lowndes v. Bettie*, 33 Law Journal Ch. 451.

No case can be stronger for the intervention of a Chancellor than where a tenant is about to make a material alteration in the premises which have been entrusted to his care; *Douglass v. Wiggins*, 1 Johnson's Ch. 435; and an injunction may be issued without pausing to inquire whether the value of the building will be enhanced or diminished by the change, because the lessor is entitled to have the property returned to him in the condition in which it was when he parted with it; *Maddox v. White*, 7 Maryland, 72; *Baughner v. Crane*, 27 Id. 36.

It is not a legal or equitable excuse for waste, that the tenant has expended money in improvements which enhance the value of the land, nor can such an outlay be taken into view in estimating the compensation for the injury; *Syckels v. Emery*, 3 C. E. Green, 387.

It seems that a Chancellor will not forbid the erection of a new building on the premises, unless it detracts from the value or usefulness of the existing structures; and such is clearly the rule, where the proposed building can be removed at the end of the term without injury to the lessor; *Win-*

ship v. Pitts, 3 Paige, 261, 262. Some of the ancient cases, said Chancellor Walworth, "restrict the tenant within very narrow limits, as to his right to alter or improve the premises held by him, without subjecting him to an action of waste, or to a forfeiture of the estate. It was for a time questionable whether a tenant or a copyholder could erect a new building upon the premises, without subjecting him to a loss of the property. But whatever doubts may have formerly been entertained on this subject, I have no hesitation in saying, that by the law of the State, as now understood, it is not waste for a tenant to erect a new edifice upon the demised premises; providing that it can be done without destroying or materially injuring the buildings or other improvements already existing thereon. I admit he has no right to pull down valuable buildings, or to make improvements or alterations which will materially and permanently change the nature of the property, so as to render it impossible for him to restore the same premises, substantially, at the expiration of the term. But to apply the ancient doctrines of waste to modern tenancies, even for short terms, would in some of our cities and villages put an entire stop to the progress of improvement, and would deprive the tenant of those benefits which both parties contemplated at the time of the demise, without any possible advantage to the owner of the reversion. The modern cases as to the right of the tenant to remove fix-

tures, or even some kinds of buildings erected for the purpose of trade or manufacture, show the change which has gradually, if not perceptibly, taken place in the law upon this subject. And upon the principles of these modern cases, it cannot be waste to make new erections upon the demised premises, which may be removed at the end of the term without much inconvenience, leaving the property in the same situation it was at the commencement of the tenancy; and the materials of which new buildings, if left on the premises, would more than compensate the owner of the reversion of the expenses of their removal. That is the nature of the building which the defendant is about to erect on the rear of this lot."

"In *Pyncheon v. Stearns*, 11 Metcalf, 312, Wilde, Justice, said: "It is held in England that a change made in the nature of the property by the tenant is waste, although the alteration may be to the greater profit of the lessor. If the tenant convert arable land into woodland, or *e converso*, or meadow into plough or pasture land, it is waste; Bac. Ab. Waste, C. J. The reasons given are, that it changes the course of husbandry, and the evidence of the estate. But these reasons are not applicable in this Commonwealth, and consequently such changes here do not constitute waste, unless they are prejudicial to the inheritance." It was held to follow that a tenant "did not commit waste by opening a way over meadow land, for his convenience, and digging

drains by the side thereof, and carrying on earth for the purpose of making the way passable; nor by erecting houses on such land, where there were none before, and digging cellars for them, and raising the ground about them; nor by carrying quantities of earth upon the low and wet parts of such land, if the occasional breaking up of such land was a judicious and suitable mode of cultivating it, and if the course of levelling the way would be small, and if, after deducting such cost, the land over which the way was made, and on which the houses were built, would, in case of their removal, be as valuable for agricultural purposes, including ploughing, and laying it down in grass, as if it had not been thus changed and lived upon."

A somewhat different view was taken in *Parkman, Admr., v. Aicardi*, 34 Alabama, 396, where Walker, J., held the following language: "In the case of *Nave v. Berry*, 22 Ala. 390, this court said, in substance, that when the contract of lease is silent, the law implies an obligation on the part of the lessee of a house not to put it to a use materially different from that for which it was constructed, and to which it is adapted, and has been usually appropriated. It is an old principle of the common law, that a tenant is guilty of waste, if he materially changes the nature and character of the building leased. Thus it is held that he cannot convert a corn-mill into a fulling-mill, or a water-mill into a wind-mill, or a logwood-mill into

a cotton-mill, or a dwelling-house into a warehouse, or a brew-house into an office; *Bridges v. Kilburn*, 5 Vesey, 689; *Kidd v. Dennison*, 6 Barbour, 13; *Jackson v. Andrews*, 18 Johns. 433; 1 Eden's Inj. 186, and notes; Addison on Contr., 380; *Shephard v. Briggs*, 26 Vermont, 449. And many authorities, both English and American, declare that such changes will be deemed waste, even though the value of the property would be enhanced by the alteration. A court of equity will consequently restrain a lessee, or his sub-lessee, from making such material alterations as would change the nature of the building; *Douglas v. Wiggins*, 1 Johns. Ch. 335; *Bonnett v. Sadler*, 14 Vesey, 526; 2 Story's Eq. §913; *Maddox v. White*, 4 Maryland, 72."]

It is a general principle, that a bill to restrain the commission of waste will be sustained, wherever an action of waste will lie at common law: "The remedy by injunction," says Chancellor Kent, "is applicable to every species of waste, it being to prevent a known and certain injury;" *Hawley v. Clowes*, 2 Johnson's Ch. 122; *Duvall v. Waters*, 1 Bland, 569, 576. But the chancery remedy will be given in many cases, where an action of waste at law would not lie: see the general outlines of equitable relief on this subject, traced in *Duvall v. Waters*, 1 Bland, 576; *Lion et al. v. Hunt et al.*, 11 Alabama, 295, 305; *Attaquin and others v. Fish*, 5 Metcalf, 140, 147, 148; *Smith v. The City Council*, 19 Georgia, 89; *Hare v.*

Hare, 2 Halsted's Chancery, 117. "There are numerous cases in chancery, as Lord Hardwicke has frequently observed," says Kent, C., "in which the court has interposed to stay waste, by the tenant, where no action can be maintained against him at law. Thus, where there is lessee for life, remainder for life, remainder in fee, the mesne remainderman cannot bring waste, nor the remainderman in fee, but chancery will interpose and stay waste. So equity will, in many cases, restrain waste, though the lease contain the clause, *without impeachment of waste*, and which takes away the remedy at law, as where this power is exercised in an unreasonable manner and against conscience;" *Kane v. Vanderbaugh*, 1 Johnson's Chancery, 11, 12; *Clement v. Wheeler*, 25 New Hampshire, 361. See also *Kidd v. Dennison*, 6 Barbour's S. Ct. 10, 15. That the complainant cannot maintain an action, tends to uphold rather than defeat the jurisdiction of chancery, as showing that the wrong is one for which there is no legal remedy.

A threat to commit waste, is a sufficient ground for an injunction, though no waste has actually been committed; *Loudon v. Warfield*, 5 J. J. Marshall, 196, 197; *Duvall v. Waters*, 1 Bland, 559, 576; *The Canal Company v. Comegys*, 2 Carter, 469; *Rodgers v. Rodgers*, 11 Barbour, 595.

A bill for waste will lie against an under-lessee by the paramount landlord; *Sarles v. Sarles*, 3 Sandford, 601. See *Ingraham v. Durnell and others*, 5 Metcalf, 118;

Atkins v. Chilson and others, 7 Id. 398. It will lie, also, between tenants in common, where the waste is not necessary to the enjoyment of the estate, and is greatly prejudicial to the interests of the cotenant, and especially where a bill is filed for a partition; *Hawley v. Clowes*, 2 Johnson's Chancery, 122; *Administrators of Johnson v. Executors of Johnson*, 2 Hill's Chancery, 277, 295.

Where there is an executory devise over, the owner of the contingent fee upon which it is limited, or of any other estate previous to it, may be restrained from the commission of waste; *Wallington v. Taylor*, Saxton's Chancery, 314, 318; *Brashear, &c., v. Macey, &c.*, 3 J. Marshall, 89, 92.

A bill may be sustained by a mortgagor against a mortgagee in possession, to restrain the commission of acts wilfully done to the destruction or detriment of the estate, because the land is only a security to the mortgagee, and for other purposes is considered in chancery as being the property of the mortgagor; *Irwin v. Davison*, 3 Iredell's Equity, 311, 321; *Rawlings v. Stewart*, 1 Bland, 22; *Downing, &c., v. Palmateer*, 1 Monroe, 64; *Youle et ux. v. Richards et al.*, Saxton, 535, 538; *Smith v. Moore*, 11 New Hampshire, 55, 62. The same relief may be had by a mortgagee against the mortgagor in possession, to prevent the commission of any waste which may impair the mortgage security; *Brady v. Waldron*, 2 Johnson's Chancery, 148; *Robinson v. Preswick*, 3 Ed-

wards, 246; *Salmon v. Clagett*, 3 Bland, 126, 180; *Brown v. Stewart*, 1 Maryland Chancery, 87; *Phoenix v. Church*, 2 Halsted's Ch. 447; *Nelson v. Pinegar*, 30 Illinois, 473; *Bunker v. Locke*, 15 Wisconsin, 635; *Haskin v. Woodward*, 9 Wright, 42. See *Robinson v. Russell*, 24 California, 467.

In like manner, in Connecticut, after land of an insolvent debtor has been attached for a debt, in a suit at law, an injunction to restrain him from waste will be granted by a court of chancery; *Camp v. Bates*, 11 Connecticut, 51; and in New York, after a sale of land on execution, during the time allowed by statute for redemption, an injunction will lie at the suit of the purchaser to restrain the defendant from committing waste; *Boyd v. Hoyt*, 5 Paige, 65; *Bank of Utica v. Messercau*, 7 Id. 517. So relief will be given in Pennsylvania to a judgment creditor, against any act tending to render the land bound by the lien inadequate to satisfy the debt; *Witmer's Appeal*, 9 Wright, 455.

It has been stated to be a general rule, that an application for an injunction to restrain waste, ought to show a good title to the land, and that a doubtful title, or a title wholly denied, will not be sufficient: see *Storm v. Mann*, 4 Johnson's Chancery, 21; *Hough v. Martin et al.*, 3 Devereux & Battle's Equity, 379, 385; *Loudon v. Warfield*, 5 J. J. Marshall, 196, 198. But in several of the States, the distinction is now established, between a contested title upon

which a suit at law is pending, and one upon which no such suit has been brought. Where an ejectment, or other action at law, to try the title, has been brought, a court of equity will restrain the commission of waste by the party in possession, till the trial and determination of the right, or till the recovery of possession, where irreparable mischief might be effected before relief could be had at law, or, under other special circumstances; *Shubrick v. Guerard*, Dessausure, 616, 619; *Kinsler v. Clarke*, 2 Hill's Chancery, 617, 618; *Duvall v. Waters*, 1 Bland, 569, 577; *Harris v. Thomas*, 1 Hening & Munford, 18; and the same course may be adopted where the conveyance, under which the defendant claims, has been obtained from the plaintiff by fraud, or undue influence; *Statts v. Freeman*, 2 Halsted, Chancery, 490. When, however, the bill shows that the defendant asserts and relies upon what he alleges to be a valid adverse title in himself, or the defendant in his answer, positively denies the plaintiff's title, and no suit at law has been brought, an injunction will not be granted; *Stewart v. Chew*, 3 Bland, 440. See also *Attaquin and others v. Fish*, 5 Metcalf, 140, 148. But it seems that an injunction may be granted when the defendant in a suit instituted to enforce an equitable right or title, abuses the power given him by possession, and commits acts of a nature to produce mischief, which is irreparable, and does not admit of compensation; *Green v. Keen*,

4 Maryland, 98. It may also be stated, as a general principle, that the dissolution or refusal of an injunction, is a matter of discretion, and will not necessarily follow from a denial of the complainant's title, when the injury to him would be irreparable, or when the purposes of justice will, in the opinion of the court, be promoted by an opposite course; *Poor v. Charleston*, 3 Sumner, 70; *post*, vol. 2, notes to *The Earl of Oxford's case*.

Formerly, it was a fixed rule, that an injunction to restrain waste could be granted only where there was an acknowledged privity of title or contract, and not where the injury was a mere trespass, and there was a legal remedy for it. Lord Thurlow and Lord Eldon, however, established the practice of granting injunctions for trespass in special cases, where irreparable mischief might ensue. It is now settled, that acts of trespass will be restrained where the damage is great and irreparable, or by constant repetition is calculated to do lasting injury to the inheritance; but still there must be something particular in the case, so as to bring the injury under the head of quieting possession, or to make out a case of irreparable mischief, or to prevent multiplicity of suits, or where the value of the inheritance is put in jeopardy; and equity will not interfere where adequate and convenient satisfaction can be had by damages at law; *Stevens v. Peekman*, 1 Johnson's Chancery, 318; *Livingstone v. Livingstone*, 6 Id.

497; *Jerome v. Rass*, 7 Id. 315, 332; *Duvall v. Waters*, 1 Bland, 569, 577; *The Georgia Creek Co. v. Detwold*, 1 Maryland Ch. 371; *Southard et ux. v. The Morris Canal*, Saxton, 519, 521; *Attaquin and others v. Fish*, 5 Metcalf, 140, 147; *Lyon et al. v. Hunt et al.*, 11 Alabama, 295, 306; *Smith v. Pettingill et al.*, 15 Vermont, 82. For ordinary trespass, where the remedy at law is adequate, and there is no case made out of irreparable mischief, an injunction will not be granted; *Cooper v. Hamilton*, 8 Blackford, 377.

Where an injunction against waste is granted, if the complainant has a claim in law to satisfaction for the value of the timber or other matters, the removal of which constitutes the waste, he is entitled, as of course, to an account, as incident to the injunction and to prevent multiplicity of suits; *Loudon v. Warfield*, 5 J. J. Marshall, 196, 198; *Livingstone v. Reynolds*, 26 Wendell, 115; *Sarles v. Sarles*, 3 Sandford, 601; *Lef-forge v. West*, 2 Carter, 514; *Rodgers v. Rodgers*, 11 Barbour, 599; *Ware v. Ware*, 2 Halsted, Ch. 117. But an account is not a necessary consequence of an injunction, and will not be allowed, except where the complainant has the immediate property in the matter which is severed from the freehold; and there are many cases in which an injunction to prevent waste will be granted for the protection and security of the complainant, and yet no damages and no account will be due to him; see *Duvall v. Waters*, 1 Bland, 659, 576; *Dow-*

ning, &c., v. *Palmateer*, 1 Monroe, 64; *Lefforge v. West*. An intermediate tenant for life may have an injunction to prevent those acts by a tenant for years, or a previous tenant for life, which are immediately injurious to his estate, but he cannot recover for the waste, because that enures to him who has the inheritance; *Mayo v. Feaster*, 2 M'Cord's Chancery, 137, 143.

But an account for waste committed, is only consequential upon an injunction, or upon some other matter of original jurisdiction; it is not in itself a substantive ground of equitable relief, as the remedy at law is adequate. "This court," said the chancellor, in *Winship v. Pitts*, 3 Paige, 259, 261, "only interferes to prevent future waste; except in cases where the complainant has no remedy at law, or a discovery is necessary, or where there is some other ground for equitable interference. In ordinary cases, the account for waste already committed, is merely incidental to the relief by injunction against future waste, and is directed upon the principle of preventing a needless multiplication of suits." The rule, however, is general, that although the recovery of damages for waste is not a substantive ground for a bill in equity, yet, if the court has jurisdiction of the subject, upon any other ground, it will decree an account of the waste committed. Thus, upon a bill for partition, against a co-tenant who has been in possession for a long time, an account of rents and profits may be ordered, and if the land has de-

teriorated in value by his treatment of it, he may be made accountable for it as for waste. "Having proper jurisdiction of the case," said the court, "there is hardly any question in relation to property, which this court may not determine incidentally for the purpose of doing complete justice, and preventing multiplicity of litigation. The rule is laid down in the case of *Jesus College v. Bloome*, 3 Atk. 262, Amb. 54, that a bill will not lie for waste merely; but if the party be properly in court for another purpose, as to obtain an injunction, then an account of past waste will be granted. The principle is very fully illustrated in the reasoning of the case. There are many cases in which an account has been allowed of the produce of mines; and the opening of mines is waste;" *Backler v. Farrow*, 2 Hill's Chancery, 111.

In like manner, ordinarily an injunction will not be granted to prevent the removal of timber already cut, even where an injunction against cutting timber in future is granted. The relief will be confined to the protection of the timber growing, unless in extraordinary cases; *Van Wyck v. Alliger*, 6 Barbour's S. Ct. 507, 514; *Johnson v. White*, 11 Id. 194. In *Watson v. Hunter*, 5 Johnson's Chancery, 169, a lessor filed a bill against his lessee for years, who had been committing great waste in timber, praying for an injunction to restrain the defendant from cutting down any more timber, and from removing that already cut down, and not sawed, and that

which was converted into boards or planks. "Injunctions to the extent prayed for may have been granted," said Chancellor Kent; "but as I am not satisfied as to the propriety of such extensive and summary interference, I have been led to look into the course of the English authorities and practice on the point. After timber is cut, it ceases to be a part of the realty, and is converted into personal property, and trover will lie for it. The question is, whether this court ought to interfere, in the first instance, to control the disposition of that personal property; and that too, without any special or extraordinary necessity stated for such interference.

"The practice of granting injunctions, in cases of waste, is to prevent or stay the *future* commission of waste; and the remedy for waste already committed, is merely *incidental* to the jurisdiction in the other case, assumed to prevent the multiplicity of suits, and to save the party the necessity of resorting to trover at law. Thus in the case of *Jesus College v. Bloome* (3 Atk. 262, Ambl. 54), a bill was filed for an account and satisfaction for waste in cutting down trees, and no injunction was prayed for, and the tenants' estate had been assigned and determined. Lord Hardwicke held that the bill was improper, and would not lie merely for satisfaction for timber cut down, and that an action of trover was the remedy. Where the bill was for an injunction to prevent waste, and for waste already committed, the court, to pre-

vent a double suit, would award an injunction to prevent future waste, and decree an account and satisfaction for what was passed. The ground for coming into chancery, was to stay waste, and not for satisfaction of the damages, as the commission of waste was a tort, and the remedy law at law. But to prevent multiplicity of suits, the court, on bills of injunction to stay waste, and where waste had already been committed, would make a complete decree, and give the injured party a satisfaction for what had been done, and not put him to another action at law. The bill, in that case, was, consequently, dismissed. In the subsequent case of *Smith v. Cooke* (3 Atk. 381), Lord Hardwicke observed, that if the estate of the lessee was determined, and he had quit, a party could not come into equity, merely for an account of timber cut wrongfully; but where he continued in possession, and in a condition to commit more waste, the party might come into equity to stay future waste, and also be entitled to an account for the waste committed. So, again in the case of *Lee v. Alston* (1 Vesey, Jr., 78), the same doctrine was declared by Lord Thurlow. A bill was filed by a remainderman in fee against a tenant for life, for an account of timber cut, and for an injunction. The answer admitted the cutting of the timber wrongfully, as charged, and an account was decreed. It was observed, that the plaintiff, on the discovery by the answer, might have resorted to trover at law, but he was

not obliged to do so, and might have an account under the admission in the answer. The chancellor referred to the case of *Whitfield v. Bewitt* (2 C. Wms. 240), which was a bill for an injunction to stay waste, and for an account of timber cut, and in which it seemed to be held, that the right to the timber cut might be pursued in chancery, as well as by trover at law.

"The same doctrine was declared by Lord Hardwicke, in *Garth v. Cotton* (1 Vesey, 528), and that the decree for an account of the waste already committed, was 'an incident' to the injunction to stay waste. It would seem, then, to be a stretch of jurisdiction to apply the injunction to this incidental remedy, and to stay the use or disposition of the chattel. This would be enlarging the substituted remedy in this court much beyond the remedy at law; and if it had been the established English practice, we should not have been without the most clear and explicit cases in proof of it. The recovery in this court is not the timber itself, in *specie*, but damages for the value of it; and why should the personal chattel be bound by injunction in this case, more than in any other case, where the remedy is for a *tort* sounding in damages? This court will stay the commission of waste, or the transfer of negotiable paper, in certain cases, in order to prevent irreparable mischief; but the only mischief that can arise in the present case, as to the timber already cut and drawn to the mills of the

defendants, is the possible inability of the party to respond in damages. That is a danger equally applicable to all other ordinary demands, and it is not an impending and special mischief, which will justify this extraordinary preventive remedy by injunction. If the injunction could be ordinarily applied to waste, already committed, I apprehend we should very rarely hear of a special action on the case, in the nature of waste, in the courts of common law.

"In the case of *The Bishop of London v. Webb* (1 P. Wms. 527), an injunction was called for against a lessee for years, to prevent digging the ground for brick, as it was destroying the field and carrying away the soil. The Lord Chancellor said, 'let the defendant carry off the brick he has dug, but he enjoined from further digging.' In *Packington's case* (3 Atk. 213), the bill stated, that the defendant had cut down a great number of trees, and had threatened to cut down and destroy them all, but the injunction only went to restrain him 'from cutting down timber trees growing.'

"The only case I have met with applicable to the very point, is a very loose note of an *anonymous* case of 1 Vesey, Jr., 93, in which the solicitor-general moved for an order to prevent the removal of timber wrongfully cut down. In what stage of the cause, or upon what state of pleadings and proofs, this motion was made, does not appear. Lord Thurlow is said to have observed, 'I have no doubt about the interference of this

court to prevent waste. The only difficulty I have, is, as to what shall be done with the timber cut. Trover might be brought for it; but, as the Register says, many orders of this kind have been made, take the order.'

"Such a case is not a sufficient authority to extend the injunction to timber already cut. There must be a very special case made out to authorize me to go so far, and such cases may be supposed. A lease, for instance, may have been fraudulently procured by an insolvent person, for the very purpose of plundering the timber under the shelter of it. Perhaps, in that and like cases, where the mischief would be irreparable, it might be necessary to interfere in this extraordinary way, and prevent the removal of the timber. I do not mean to be understood to say, that the court will never interfere, but

that it ought not to be done in ordinary cases like the present. I shall accordingly confine the injunction to the timber standing or growing at the time of the service of the process." See, also, *Kidd v. Dennison*, 6 Barbour's S. Ct. 10, 18.

In accordance with the principles indicated in the case of *Watson v. Hunter*, it has since been determined, that where a bill is filed to prevent future waste, and also to prevent the removal of timber already cut, or have an account of waste already committed, the court, to avoid multiplicity of suits, will allow an account and satisfaction for what has been done, and if the defendant is insolvent, and the mischief would therefore be irreparable, will grant an injunction against removing or disposing of timber already cut on the premises: *Spear v. Cutter*, 5 Barbour's S. Ct. 487, 489

*LESTER [or LYSTER] v. FOXCROFT AND OTHERS. [*768]

APRIL 7, 1701.

REPORTED 1 COLLE'S P. C. 108.¹

PART PERFORMANCE OF A PAROL CONTRACT RESPECTING LAND.]—
Specific performance of a parol agreement to grant a lease decreed, notwithstanding the Statute of Frauds, after acts of part-performance on the part of the lessee by pulling down an old house, and building new houses according to the terms of the agreement.

The appellant stated, that Isaac Foxcroft was seised in fee of a part of an ancient messuage called Wildhouse, in the parish of St. Giles's-inn-the-Fields, in the county of Middlesex, and pos-

¹ *S. C.*, cited 2 Vern. 456, nom. *Foxcraft v. Lister*; Gilb. Rep. 4; Prec. Ch. 519, 526, nom. *Leicester v. Foxcroft*.

essed of other part thereof for a long term of years, and agreed with several builders to pull down parts thereof, and build new houses thereon; and about 25th March, 1695, proposed to make such agreement for part of the said house with appellant, and promised to assist him with money without interest, in case he should want it to finish the building; and it was *particularly agreed between them, that appellant should at his own cost pull down a certain part of the messuage, and build thereon fourteen or more good messuages; and that Foxcroft should, in consideration thereof, lease the said part to appellant*, from Michaelmas, 1695, for ninety-nine years, at a pepper-corn for the first year, and 150*l.* yearly rent for the last ninety-eight years.

At the time of making such agreement, *there was no memorandum or note thereof in writing; but in performance of the agreement* appellant entered into that part of the messuage, and, at his own cost pulled down the same, and built several new houses thereon [*769] (the whole fourteen **being almost finished*), and therein disbursed several thousand pounds—about 2000*l.* his own money—and several sums borrowed from Foxcroft upon his own securities, yet unsatisfied, and was all along in possession, and acted as sole proprietor and owner, and was acknowledged as such by Foxcroft, who frequently declared that he had only a ground rent, and that appellant was the landlord; and as any of the new houses were finished, appellant demised the same in his own name, received the rents, and Foxcroft never received nor claimed any part thereof.

About August, 1698, Foxcroft (being then ill of the sickness whereof he died) made his will, and his daughter, Elizabeth Foxcroft, sole executrix; and devised to his second son, Isaac Foxcroft, his heirs and executors, all his estate in the said ancient messuage called Wildhouse; and if he died under twenty-one, to his eldest son Henry Foxcroft, his daughter Elizabeth, and Benjamin Whichcott, and appointed Francis Nicholson guardian of his son Isaac, with power to let and set for such time during his minority. And immediately after making the said will, he delivered it to appellant's wife, to let the appellant see there was nothing therein inconsistent with his said agreement; and ordered her to get a lease prepared speedily according to the agreement; and delivered to her two building leases executed by him, in pursuance of like agreements with others, as precedents to have appellant's lease drawn by; and appellant accordingly caused the leases to be prepared, bearing date about the time of the said agreement, and brought two parts thereof to Foxcroft to be executed, who caused both of them to be read to him, and approved of the same; but observed that there was a mistake in one part thereof in his name, John being put for Isaac, and disliked that the sealing and delivery was not endorsed on the back thereof; and thereupon ordered appellant to get the mistake amended, and the endorsement made by the same hand that engrossed the deeds, and then to bring them again, and he would execute them; and often ex-

pressed his dissatisfaction *that they were not brought back for execution as soon as he expected, and was under great uneasiness of mind lest he should die before it was done. [*770]

And appellant, a few days before the death of Foxcroft, brought the deeds, so amended, to his house, to have them so executed as he had directed, but respondent refused to let appellant see or speak with Foxcroft, and used several indirect and unfair methods to prevent him from executing the said leases, by means whereof he died without executing them; and since his death, respondents refused to execute leases, according to the agreement, whereon appellant, in Hilary Term, 1698, exhibited his bill in Chancery for a specific execution of the agreement, and the cause being heard, 6th March, 1700, the Lord Keeper,¹ declared that there was no sufficient proof of the said agreement, and ordered appellant's bill to stand dismissed without any relief; *which decree appellant insisted ought to be reversed, for that the agreement was sufficiently proved; and though not originally reduced into writing, occasioned by the entire confidence the parties had in each other, yet the same having been, at appellant's great expense, so far executed on his part, there ought to be a reciprocal performance of it on the other part; and the rather so, as the terms of the agreement were reduced to a certainty, by the lease prepared by direction of the lessor, and the execution thereof prevented by the unfair practices of the respondents, or some of them.*

The respondents, in affirmance of the decree, alleged, that Isaac Foxcroft made his will, dated 30th August, 1698, of the import stated by appellant, and died 15th September following; and, in Hilary Term then next, appellant filed his bill against respondents for a specific execution of a parol agreement expended; and that respondents had answered, that they knew not that appellant was any ways concerned in pulling down and rebuilding the premises, otherwise than as agent or servant for the testator, at whose proper charge and expense they insisted the work was done; and denied that any such agreement for a lease was ever made by the testator to the appellant; *and showed that the appellant was greatly indebted to the testator before any building began, [*771] and that the testator had no other way to obtain his debt but by employing him in work; and that the testator, though of perfect understanding, had not taken any notice of such supposed agreement in his will; and that the appellant had not required a performance thereof, for near three years and a half after, nor until so near an approach of the testator's death; and showed, further, that three of the appellant's witnesses were considerable legatees in the testator's will, and that their evidence tended to enlarge the personal estate for their own benefit; and finally, insisted, that nothing of such pretended agreement being in writing, and signed by either of the parties, the statute made for preventing frauds and perjuries was a full bar to the appellant's pretences.

¹ Sir Nathan Wright.

Die Lunæ, 7^o Aprilis, 1701. Upon hearing counsel on this appeal, it was ordered and adjudged by the Lords, that the decretal order of dismissal complained of should be reversed, and that the respondent, Isaac Foxcroft, or such other of the repondents to whom the estate in question should come, by virtue of his father's will, should, when he or they should be of age, execute to the appellant Lyster, his executors, &c., such a lease of the premises in question, as was prepared and approved of by the said Isaac Foxcroft, the father, before his death, and that the appellant and his assigns should, in the meantime, hold and enjoy the same, under the covenants and agreements in the said intended lease contained, discharged of all incumbrances done by said Isaac Foxcroft, or any claiming under him.—Lords' Journ. vol. xvi., p. 644.

"The Statute of Frauds," observes Lord Redesdale, "says, that no action or suit shall be maintained on an agreement relating to lands, which is not in writing, signed by the party to be charged with it; and yet the Court is in the daily habit of relieving, where the party seeking [*772] relief has been put into a situation which makes it against *conscience in the other party to insist on the want of writing so signed, as a bar to his relief. The first case (apparently) of this kind was *Foxcraft v. Lyster*, cited 2 Vern. 456, and reported in Colles's Parl. Cas. 108. That case was decided on a principle acted upon in courts of law, though not applicable by the modes of proceeding in a court of law to the particular case. It was against conscience to suffer the party who had entered and expended his money on the faith of a parol agreement to be treated as a trespasser, and the other party to enjoy the advantage of the money he had laid out. At law, fraud destroys rights. If I mix my corn with another's, he takes all; but, if I induce another to mix his corn with mine, I cannot then insist on having the whole. The law in that case does not give me his corn. The case of *Foxcraft v. Lyster*, therefore, I conceive, was decided on clear principle; though, whether the cases founded on that case have been all so well considered, I will not take upon me to say. But it appears, from these cases, that courts of equity have decided on equitable grounds, in contradiction to the positive enactment of the Statute of Frauds, though their proceedings are in words included in it;" *Bond v. Hopkins*, 1 S. & L. 433. See also *Clinan v. Croke*, 1 S. & L. 41; *Duke of Leeds v. The Earl of Amherst*, 20 Beav. 239; *Dillwyn v. Llewellyn*, 10 W. R. (L. C.) 742.

The principle on which the Court proceeds in these cases is this, that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title un-

der that Act of Parliament, and imposes upon him a personal obligation, because he applies the Act, as an instrument for accomplishing a fraud. Per Lord Westbury, 4 L. R. Ho. Lo. 97. See, also, *Haigh v. Kaye*, 7 L. R. Ch. App. 469; 20 W. R. (L. J.) 597.

Acts merely introductory or ancillary to an agreement, although attended with expense, are not considered acts of part performance. Thus, the delivery of abstracts of title, giving orders for conveyances to be drawn and engrossed, going to view an estate, putting a deed into a solicitor's hands to prepare a conveyance, employing surveyors to value timber on an estate, or fixing upon persons as appraisers to value stock, appointing a person to make a valuation of the land, registering deeds, and similar acts of an equivocal nature, are not sufficient acts of part performance to take a parol contract out of the statute; *Hawkins v. Holmes*, 1 P. Wms. 770; *Pembroke v. Thorpe*, 3 Swanst. 437, n.; *Clerk v. Wright*, *1 Atk. 12; *Whitbread v. Brockhurst*, 1 Bro. [*773] C. C. 412; *Whitchurch v. Bevis*, 2 Bro. C. C. 559; *Redding v. Wilkes*, 3 Bro. C. C. 400; *Cooke v. Tombs*, 2 Anst. 420; *Cooth v. Jackson*, 6 Ves. 17, 41; *Stokes v. Moore*, 1 Cox, 219; *Frame v. Dawson*, 14 Ves. 386; *Phillips v. Edwards*, 33 Beav. 440.

Payment of part of the consideration-money is not an act of part performance so as to take a contract out of the Statute of Frauds. See *Clinan v. Cooke*, 1 S. & L. 40; where it seems that the only circumstance that could be urged as an act of part performance, was the payment of the sum of fifty guineas to Mr. Cooke; but Lord Redesdale held it not to be an act of part performance. "It has always," observed his Lordship, "been considered that the payment of money is not to be deemed part performance to take a case out of the statute. *Seagood v. Meale*, Prec. Ch. 560, is the leading case on that subject; there a guinea was paid by way of earnest, and it was agreed clearly, that it was of no consequence in case of an agreement touching lands. Now, if payment of fifty guineas would take a case out of the statute, payment of one guinea would do so equally, for it is paid in both cases as part payment, and no distinction can be drawn; but the great reason, as I think, why part payment does not take such agreement out of the statute is, that the statute has said (sect. 13), that in another case, viz. with respect to goods, it shall operate as part performance. And the Courts have, therefore, considered this as excluding agreements for lands, because it is to be inferred, that when the legislature said it should bind in the case of goods, and were silent as to the case of lands, they meant, that it should not bind in the case of lands." And see *O'Herlihy v. Hedges*, 1 S. & L. 123. However, notwithstanding what is said by Lord Redesdale, a contrary doctrine seems at one time to have prevailed. (See the cases cited in the note to *Clinan v. Cooke*, 1 S. & L. 40.) But Lord Redesdale's doctrine is now universally adopted, and it has even been recently laid down that the payment of *all* the purchase-money will

not be considered an act of part performance to take a parol contract out of the Statute of Frauds: *Hughes v. Morris*, 2 De Gex, Mac. & G. 356.

But admission into possession having unequivocal reference to the contract, has always been considered an act of part performance. The acknowledged possession of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorise an inquiry into the terms, the Court regarding [*774] what has been done as a consequence of contract *or tenure; *Morphett v. Jones*, 1 Swanst. 181; *Borret v. Gomeserra*, Bunb. 94; *Earl of Aylesford's case*, 2 Stra. 783; *Lacon v. Mertins*, 3 Atk. 1; *Wells v. Straddling*, 3 Ves. 381; *Bowers v. Cator*, 4 Ves. 91; *Gregory v. Mighell*, 18 Ves. 328; *Kine v. Balfe*, 2 Ball & B. 343; *Pain v. Coombs*, 3 Sm. & Giff. 449, 1 De G. & Jo. 34; *Shillibeer v. Jarvis*, 8 De G. Ma. & G. 79): a fortiori where, as in *Lester v. Foxcroft*, the person seeking specific performance has laid out money in building or in improvements. See *Floyd v. Buckland*, 2 Freem. 268; *Mortimer v. Orchard*, 2 Ves. jun. 243; *Toole v. Medicott*, 1 Ball & B. 393; *Wheeler v. D'Esterre*, 2 Dow, 359; *Norris v. Jackson*, 10 W. R. (V. C. S.) 228; *Crook v. Corporation of Seaford*, 6 L. R. Ch. App. 551.

But in all these cases, in order to amount to part performance, the acts must be unequivocally referable to the agreement; and the ground on which Courts of equity have allowed such acts to exclude the operation of the statute is fraud. A party who has permitted another to perform acts on the faith of an agreement, shall not insist that the agreement is bad, and that he is entitled to treat those acts as if it had never existed. That is the principle, but the acts must be referable to the contract: *Morphett v. Jones*, 1 Swanst. 181; *Attorney-General v. Day*, 1 Ves. 221; *Walker v. Walker*, 2 Atk. 100; *Buckmaster v. Harrop*, 1 Ves. 346; *Whitbread v. Brockhurst*, 1 Bro. C. C. 417; *S. C.*, 2 V. & B. 154, n.; *Hawkins v. Holmes*, 1 P. Wms. 770; *Wills v. Stradling*, 3 Ves. 378; *Meynell v. Surtees*, 3 Sm. & Giff. 101; *Hollis v. Edwards*, 1 Vern. 159, and Mr. Raithby's note; *Farrall v. Davenport*, 3 Giff. 363. "I take it," observes Lord Redesdale, "that nothing is to be considered as a part performance which does not put the party into a situation that is a fraud upon him, unless the agreement is performed; for instance, if, upon a parol agreement, a man is admitted into possession, he is made a trespasser if there be no agreement. This is put strongly in the case of *Foxcraft v. Lyster*: there the party was let into possession on a parol agreement, and it was said that he ought not to be liable as a wrong doer, and to account for the rents and profits; and why? Because he entered in pursuance of an agreement. Then, for the purpose of defending himself against a charge which might otherwise be made against him, such evidence was admissible; and, if it was admissible for such purpose, there is no reason why it should not be admissible

throughout. That, I apprehend, is the ground on which Courts of equity have proceeded, in permitting part performance of an agreement to be a ground for avoiding the statute; and I take it, therefore, that nothing is to be considered as part performance which is not [*775] of that nature. Payment of money is not part performance, for it may be repaid; and then the parties will be just as they were before, especially if repaid with interest. It does not put a man who has parted with his money into the situation of a man against whom an action may be brought; for in the case of *Foxcraft v. Lyster*, which first led the way, if the party could not have produced in evidence the parol agreement, he might have been liable in damages to an immense extent;" *Clinan v. Cooke*, 1 S. & L. 41.

Moreover, it is essential that possession should be delivered according to the contract, and not obtained wrongfully, otherwise it will not be considered as an act of part performance. Thus, in *Cole v. White*, before Lord Camden, in 1767 (cited 1 Bro. C. C. 409), where there was an agreement for a lease for four years, and the bill charged that possession was given, the defendant pleaded the statute, and by his answer denied that possession was delivered in part performance, and swore that the plaintiff obtained it wrongfully. The plea was allowed, and Lord Camden added that the giving instructions for a lease could not make part of the case as a part performance.

In *Millard v. Harvey*, 13 W. R. (M. R.) 125, 34 Beav. 237, the plaintiff's wife, without his knowledge, paid 150*l.* to the defendant with the desire of purchasing a field for the plaintiff. The defendant refused to sell, but kept the money and paid no interest. A few days afterwards he told the plaintiff he might have the field to put his horse in. The plaintiff occupied it for ten years without paying any rent, and in ignorance of what his wife had done. It was held by Sir John Romilly, M. R., that as there was a contract with the wife as agent for her husband, subsequently adopted by him, and accompanied by possession for ten years, the Court ought to decree specific performance.

Where subsequently to the institution of a suit for specific performance of a parol agreement, upon the ground of part performance, the plaintiff has obtained by Act of Parliament the means of quieting his possession, without further assistance, from a Court of equity, inasmuch as the jurisdiction in cases of specific performance is discretionary, his right to a decree will be materially affected where it depends on the principle of protecting the possession: *Meynell v. Surtees*, 3 Sm. & Giff. 101, 116.

As between landlord and tenant, it is to be observed that the mere continuance in possession by the tenant is not alone of itself an act of part performance of a parol agreement. In *Wills v. Stradling*, 3 Ves. 381, Lord Loughborough, C., observes, "As to the possession [*776] in the case of a tenant, who of course continues in possession

unless he has notice to quit, the mere fact of his continuance in possession (for *quo animo* he continued in possession) would not weigh. The delivery of possession by a person having possession, to the person claiming under the agreement, is a strong and marked circumstance: but the mere holding over by the tenant, which he will do, of course, if he has no notice to quit, would not of itself take the case out of the statute, or even call for an answer." See, also, *Smith v. Turner*, Prec. Ch. 561; *Savage v. Carroll*, 1 Ball & B. 265; *Morphett v. Jones*, 1 Swanst. 181. But in a case where there was a payment of an increased rent referable to the agreement, Lord Loughborough ordered the plea of the Statute of Frauds to stand for an answer, with liberty to except. "Payment of additional rent," he observed, "per se, is an equivocal circumstance, it is true. It may be that he shall hold over from year to year, the lease being expired. There may be other inducements. But how stands the averment upon this plea? It is, that the landlord accepted the additional rent upon the foot of the agreement. Then the acceptance upon the ground of the agreement, which is the averment upon this plea, is not equivocal at all. It is incumbent upon the defendant to say, whether it was merely accepted upon a holding from year to year, or any other ground. How would it stand at law? Suppose this averment was proved by parol evidence, it would be a good lease for three years, and would defend the tenant against an ejectment brought within the three first years. *Charlewood v. The Duke of Bedford* (1 Atk. 497), which finally turned upon the want of authority in the steward, is an authority upon which, under the circumstances alleged in this bill, the benefit of the plea ought to be saved to the hearing." *Wills v. Stradling*, 3 Ves. 378; and see *Lord Desart v. Goddard*, 1 Wallis Rep. by Lyne, 347.

In a recent case, Lord Cranworth, C., has held the payment of an increased rent to be an act of part performance: *Nunn v. Fabian*, 1 Law. Rep. Ch. App. 35. And see *Clarke v. Reilly*, 2 I. R. C. L. (Exch.) 422; *Howe v. Hall*, 4 I. R. Eq. 242; *Archbold v. Lord Howth*, 1 I. R. C. L. 608.

The laying out of money by the tenant continuing in possession, if it was part of the contract that money should be laid out, and it is one of the considerations for granting the lease (the laying out of which must be then with the privity of the landlord, it is very strong to take it out of the statute.)—Per Lord Loughborough, C., in *Wills v. Stradling*, 3 Ves. 382. In *Mundy v. Jolliffe*, 5 My. & Cr. 167, a tenant from year to year of a farm having, at his own expense, drained the lands upon the farm, and laid down *into pasture, the only piece of arable [*777] land which the farm contained, and repaired the buildings, pursuant to a parol agreement for a lease, Lord Cottenham, C., (overruling the decision of Sir L. Shadwell, V. C., reported 9 Sim. 413), upon proof of the agreement decreed specific performance, saying, there was

no doubt of the part performance. In the case of *Sutherland v. Briggs* (1 Hare, 26), the plaintiff was lessee of a house and other premises for a term of thirty-one years, at a rent of 60*l.*, and was under a covenant to make certain improvements on the property. He was also tenant from year to year of an adjoining meadow belonging to a different proprietor, at a rent of 9*l.* The lessor of the house became the purchaser of the meadow, and by arrangement between him and the plaintiff, the improvements were extended, and part of the house was made to project over the field, and part of the field was attached to the demised premises; the plaintiff paying about half of the expense of the alterations, which far exceeded the sum he had originally covenanted to lay out, and also signing a memorandum which the lessor drew up, whereby he agreed to pay an entire rent of 80*l.* a year for the consolidated property. It was held by Sir James Wigram, V. C., that the extension of the house into the meadow, by the plaintiff, with the concurrence of his landlord, was evidence of, and was a sufficient consideration for, a contract to demise the meadow; that the act of building part of the house upon the meadow, if it was evidence of any right, was evidence of a right which affected the entire tenement, and that it could not be restricted so as to affect only the part of the meadow actually built upon; that the extension of the house, part of the demised premises, into the meadow and the increase and consolidation of the rents, was evidence that the meadow was to be held for the same term as the demised premises; and that the doctrine with regard to the mutuality of contracts had no application to such a case. "The first point," observed his Honor, "suggested rather than pressed, was, that, the plaintiff being in possession of the meadow as tenant from year to year, the expenditure upon the property did not unequivocally show that it had proceeded upon some antecedent contract with the landlord. Undoubtedly, it is, in general, necessary that an act of part performance, which is to take a case out of the Statute of Frauds, should unequivocally demonstrate the existence of some contract to which it must be referred: *Morphett v. Jones*, 1 Swanst. 172. But if the act of extending the house, in which the tenant had an interest for a term of years, into the meadow, with the landlord's consent, be not evidence of a contract between them, I know not what act on the part of a tenant in possession of *property could possibly be so considered. Circumstances much less stringent have been deemed sufficient (1 [*778] Sugd. V. & P. p. 20, 10th ed.); and if the case of *Mundy v. Jolliffe* (5 My. & Cr. 167), in which Lord Cottenham differed from the Vice-Chancellor of England, may be considered as correctly illustrating the rule of this Court as to the acts of part performance which will take a case out of the statute, the alterations of the garden-fence and making the plantation in the meadow, would be sufficient. In that case, the expenditure by the tenant was in draining the land, and the Court decreed

Mr. Jolliffe to grant him a lease upon the promise of which it was said the expense of draining had been incurred.

"It was next said, that the justice of the case would be satisfied by giving to the plaintiff so much of the meadow as the house stands upon, which the defendant offered to do. To the suggestion, that justice would be satisfied by doing this, I cannot accede; for some additional portion of the meadow would be essential to the enjoyment of the house. The rules of this Court, however, will not permit me so to consider the case. If the acts done by the plaintiff are to be considered acts of part performance, taking the case out of the operation of the statute, the rules of the Court entitle him to prove the entire agreement which the acts relied upon were intended partly to perform. The act of building part of the house upon the meadow was an act affecting the whole tenement—namely, the meadow—and not that part of it only upon which the house stands. The case of *Mundy v. Jolliffe*, will apply also to this part of the present case." See, also, *Howe v. Hall*, 4 I. R. Eq. 242; but see *Frame v. Dawson*, 14 Ves. 386.

In *Parker v. Smith* (1 Coll. 608), the landlord of a coal set, having four tenants in partnership together holding under a lease, several years of which were unexpired, entered into a parol agreement with all four upon the surrender of the old lease to grant a new one to two of the partners—the plaintiffs,—upon the terms that the partnership should be dissolved, and that the plaintiffs should release the two retiring partners from all liability. The dissolution and release so agreed upon took place, by which the plaintiffs took upon themselves the liability which had before been shared by the four. Sir J. L. K. Bruce, V. C., decreed specific performance of the agreement. "It is," said his Honor, "part of the entire agreement that the dissolution and release shall take place. They do take place. It is impossible to treat these acts otherwise than as acts of part performance, taking the case out of the Statute of Frauds."

Although there have been acts of part performance, the terms of the contract must be certain and *unambiguous: *Clinan v. Cooke*, [*779] 1 S. & L. 22; *Boardman v. Mostyn*, 6 Ves. 467, 470; *Symondson v. Tweed*, Prec. Ch. 374; *Foster v. Hale*, 3 Ves. 712, 713; *Savage v. Carroll*, 1 Ball & B. 265, 551; *S. C.*, 2 Ball & B. 451; *Tooke v. Medlicott*, 1 Ball & B. 404; *Lindsay v. Lynch*, 2 S. & L. 1; *Reynolds v. Waring*, 1 You. 346.

Where the evidence of the parties as to the terms of the contract is in some respects contradictory, specific performance will be decreed, if the Court, by directing inquiries and collect what were the terms about which the parties differ. Thus, in *Mortimer v. Orchard*, 2 Ves. jun. 243, where the plaintiff had built a house, his witness proved an agreement different from that set up by the bill, and the answers stated an agreement different from both. Lord Loughborough, C., said, that

in strictness, the bill ought to be dismissed, but, on account of the expenditure, decreed specific performance, according to the agreements admitted by the answers.

So, likewise, "in a case that came from Malton, in Yorkshire, possession having been delivered in pursuance of a parol agreement, and a dispute arising upon the terms of the agreement, Lord Thurlow thought proper to send it to the Master, upon the ground of the possession being delivered, to inquire what the agreement was. The difficulty there, was in ascertaining that. The Master decided as well as he could; and then the cause came before Lord Rosslyn, upon further directions, who certainly seemed to think Lord Thurlow had gone a great way, and either drove them to a compromise, or refused to go on with the decree upon the principle on which it was made.—Per Lord Eldon, in *Boardman v. Mostyn*, 6 Ves. 470, in which case his Lordship also observed, "that, if it was *res integra*, the soundest rule would be, that, if the party leaves it uncertain, the agreement is not taken out of the statute sufficiently to admit of its being enforced." See, also, *Mundy v. Jolliffe*, 5 My. & Cr. 177, in which case Lord Cottenham says, "Courts of equity exercise their jurisdiction in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money, or otherwise acted, in execution of the agreement. Under such circumstances, the Court will struggle to prevent such injustice from being effected; and with that object it has at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavoured to collect, if it can, *what the terms of it really were." See also *Laird v. The Birkenhead Railway Company*, [*780] Johns. 500; *Wilson v. The West Hartlepool Railway Company*, 10 Jur. N. S. 1065; 11 Jur. N. S. 124; 13 W. R. (M. R.) 4; *Ib.* (L. J.) 361; 34 Beav. 187; *S. C.*, 2 De G. Jo. & Sm. 475; *Oxford v. Provand*, 2 L. R. P. C. 135, 148; *Baumann v. James*, 3 L. R. Ch. App. 508.

It must be always borne in mind, "that part performance, to take a case out of the Statute of Frauds, always supposes a completed agreement. There can be no part performance where there is no completed agreement in existence. It must be obligatory, and what is done must be under the terms of the agreement, and by force of the agreement." Per Lord Brougham in *Lady Thynne v. Earl of Glengall*, 2 H. L. Cas. 158; *In re Thomas Ryan*, 3 I. R. Eq. 238.

Companies and corporations are bound equally with individuals by acts of part performance: *Wilson v. The West Hartlepool Railway Company*, 10 Jur. N. S. 1064; 11 Jur. N. S. 124, 13 W. R. (M. R.) 4, *Ib.*

(L. J.) 361; 34 Beav. 187; 2 De G. Jo. & Sm. 475; *Steeven's Hospital v. Dyas*, 15 Ir. Ch. Rep. 405.

An agreement by a corporation to let land upon lease, although not under their seal, will be enforced against the corporation, where there have been acts of part performance on the part of the intended lessee. See *Crook v. Corporation of Seaford*, 6 L. R. Ch. App. 551. There at a general court of assembly of the corporation, on the 5th of January, 1860, a resolution was passed and entered in the books of the corporation, agreeing to let to the plaintiff the flat part of the beach opposite to his field for the term of three hundred years, to commence on the 14th of February, 1860, at 10s. per annum rent, the land to be stumped out by the committee and the plaintiff, at the plaintiff's expense, and a concrete terrace was to be completed by the plaintiff for a public walk. A copy of the resolution was sent to the plaintiff, who accepted the terms offered, stumped out and entered into possession of the lands of the corporation, and from the 14th of February, 1860, to 1865, paid the rent of 10s. per annum to the corporation. The plaintiff also, on the faith of the agreement, erected a sea wall about 700 feet long (averaging ten feet high and three feet thick), and, in February, 1861, completed a concrete terrace, in accordance with a plan submitted to the corporation, which was left open as a public walk. The bailiff and other members of the corporation had inspected the works during their progress. In 1864 the corporation gave the plaintiff notice to quit, and, after much negotiation, in 1869 brought an action of ejectment against the plaintiff. [*781] *Upon a bill filed by the plaintiff, it was held by Lord Hatherley, C., affirming the decision of Sir John Stuart, V. C. (10 L. R. Eq. 678), that he was entitled to a decree for specific performance against the corporation. "One of the objections," said his Lordship, "raised by the corporation upon this bill being filed, was that the agreement was not under seal. But a corporation, although it may not have eyes to see what is going on, has agents who can see, and if the corporation allow a wall to be built and money to be expended on the faith of a resolution regularly entered in their books, they must be answerable. As to the power of this corporation to grant such a lease, they are not within the Municipal Corporations Act, and they get a wall and terrace built upon land which was of no use to them, and they thereby encourage people to build houses. It cannot be said to be an improvident lease."

It has been said in a recent case, that the doctrine of part performance of a parol agreement is not to be extended by the Court, and that it is inapplicable to the case where a trustee has a power to lease, at the request, in *writing*, of a married woman, which has not been made. See *Phillips v. Edwards*, 33 Beav. 440.

This, however, is a mere dictum, as there was no act of part performance in the case.

Although it is clear that where a parol contract is made in consideration of marriage, the subsequent marriage will not be an act of part performance so as to take the case out of the Statute of Frauds, inasmuch as the statute expressly provides that a contract in consideration of marriage shall not be binding unless it be in writing (*Dundas v. Dulens*, 1 Ves. Jun. 196; *Lassence v. Tierney*, 1 Mac. & G. 551; *Warden v. Jones*, 23 Beav. 487, De G. & Jo. 76; *Cooper v. Warmold*, 7 W. R. (M. R.) 402; *Caton v. Caton*, 1 Law Rep. Ch. App. 137, affirmed 2 L. R. Ho. Lo. 127, reversing S. C., 13 W. R. (V. C. S.) 801, 33 L. J. (Ch.) 564; *M'Askie v. M'Cay*, 2 I. R. Eq. 447; nevertheless, a parol contract may be taken out of the statute by acts of part performance independently of the marriage. Thus, in *Surcombe v. Pinniger*, 3 De G. M. & G. 571, a father previous to the marriage of his daughter told her intended husband that he meant to give certain leasehold property to them on their marriage. After the marriage he gave up possession of the property to the husband, to whom he directed the tenants to pay the rents, and handed to the husband the title deeds. The husband also expended money upon the property. It was held by the Lords Justices, that there had been sufficient part performance of the parol contract to take the case out of the Statute of Frauds. "In this case," said Lord Justice Turner, "there is a part performance by the [*782] delivering up of possession to the husband—a fact which has been always held to change the situations and rights of the parties, and there has been considerable expenditure by him on the property. There is, therefore, here what was wanting in *Lassence v. Tierney*, viz., acts of part performance, besides the marriage. The difficulty in these cases is that the Statute of Frauds presents an obstacle to suing upon the agreement. But it has been held, in many cases, that if there be a written agreement after marriage in pursuance of a parol agreement before marriage, this takes the case out of the statute, so does also part performance." See also *Taylor v. Beech*, 1 Ves. 297.

Although marriage is not a part performance of a contract within the Statute of Frauds, nevertheless where a person marries upon the faith of representations or promises made to him for the purpose of influencing his conduct with reference to the marriage, the person making such representations or promises will be compelled in equity to make them good, not only at the instance of the person to whom they were made (*Hammersley v. De Biel*, 12 C. & F. 45; S. C., *nom. De Biel v. Thompson*, 3 Beav. 469; *Payne v. Mortimer*, 1 Giff. 118; 4 De G. & Jo. 447; *All v. All*, 4 Giff. 84: and see *Loffus v. Maw*, 3 Giff. 592); but also at the instance of the issue of the marriage (*Walford v. Gray*, 13 W. R. (V. C. S.) 335; *Ib.* (L. C.) 761). See also *Skidmore v. Bradford*, 8 L. R. Eq. 134.

The representation or promise must, however, be clear and absolute (*Randall v. Morgan*, 12 Ves. 67; and see *Maunsell v. White*, 1 Jo. & L.

567; *Loxley v. Heath*, 27 Beav. 523; 1 De G. F. & Jo. 489; *Kay v. Cook*, 3 Sm. & Giff. 407; *Jameson v. Stein*, 21 Beav. 5; and where it is contained in a lost document parol evidence is admissible as to its contents: *Gilchrist v. Herbert*, 26 L. T. Rep. (N. S.) 381.

A parol promise, moreover, made prior to a marriage cannot be enforced if the marriage did not take place by reason of any reliance on such promise, or if it was not acted on as a reason and consideration for the marriage: *Goldicutt v. Townsend*, 28 Beav. 445; *Jameson v. Stein*, 21 Beav. 5; and a fortiori where it is waived by the parties; *Caton v. Caton*, 2 L. R. Ho. Lo. 127, 142

And where the representation is merely of what a party intends to do, without pledging himself to its performance, or where the promise is of such a character that the person making it refuses to enter into a contract, giving the party to whom it is made to *understand [*783] that he must rely on or trust to his honour, it has been held, though with great conflict of opinion, that the Court of Chancery cannot enforce the performance of the representation or promise: *Maunsell v. White*, 1 Jo. & L. 539; 4 Ho. Lo. Ca. 1039; *Jorden v. Mooney*, 5 Ho. Lo. Ca. 185; *S. C., nom. Money v. Jorden*, 15 Beav. 372; 2 De G. Mac. & G. 318. See the remarks on this case in *Loffus v. Maw*, 3 Giff. 592, 604; *Prole v. Soady*, 2 Giff. 1; *M'Askie v. M'Cay*, 2 I. R. Eq. 447.

Although a written contract cannot be varied by parol, a Court of equity, when there have been acts of part performance of the parol variation, will decree a specific performance of the contract, with the variation. Thus, in the *Anonymous case*, reported 5 Vin. Ab. 522, pl. 38, W. leased a house to N. for eleven years, and was to allow 20*l.* to be laid out in repairs. The agreement was reduced into writing, signed and sealed by both parties. N. repaired the house, and finding it to take a much greater sum than the 20*l.*, told W. of it, and that he would, nevertheless, go on, and lay out more money, if he would enlarge the term to twenty-one years, or add fourteen, or as many as N. should think fit. W. replied that they would not fall out about that, and afterwards declared that he would enlarge the term, without mentioning any term in certain. The question was, whether this new agreement, made by parol, which varied from the written agreement, should be carried into execution, notwithstanding the Statute of Frauds? The Master of the Rolls said, that, before the statute, written agreements could not be controlled by a parol agreement, contrary to it, or altering it; but *this is a new agreement, and the laying out the money is a performance on one part*, and ought to be carried into execution; and built his decree upon these cases—first, where a parol agreement was for a building lease, and before it was reduced into writing the lessee began to build, and, after differing on the terms of the lease, the lessee brought a bill, and the lessor insisted on the Statute of Frauds: the Lord Keeper dismissed the bill, but the plaintiff was relieved in

Dom. Proc.: and the second was a case in Lord Jefferies' time, MS. Rep. Mich., 4 Geo., Canc.

A contract will be taken out of the Statute of Frauds where the provisions of the statute have not been complied with, in consequence of the fraud of the person against whom a decree for specific performance is sought: *Maxwell v. Montacute*, Prec. Ch. 526; *Walker v. Walker*, 2 Atk. 98; *Joynes v. Statham*, 3 Atk. 389; *Whitchurch v. Bevis*, 2 Bro. C. C. 565; *Lincoln v. Wright*, 4 De G. & Jo. 16, 22; and, therefore, in the principal case, even had there been no acts *of part performance of the agreement, if, as was alleged, the execution of the lease had been prevented by indirect and unfair means, there might have been sufficient grounds for the Court to have decreed a specific performance.

Lord North appears to have thought, although he never actually so decided, that where it was part of the agreement that it should be put into writing, the agreement would be taken out of the Statute of Frauds. See *Hollis v. Whiteing* or *Edwards*, 1 Vern. 151, 159; *Leak v. Morrice*, 2 Ch. Ca. 135. But Lord Thurlow, in *Whitchurch v. Bevis*, where this doctrine was urged at the Bar, said, "I take that to be a single case, and to have been overruled. If you interpose the *medium of fraud*, by which the agreement is prevented from being put into writing, I agree to it; otherwise, I take Lord North's doctrine, 'that if it had been laid in the bill that it was part of the agreement that it should be put into writing, it would have done,' to be a single decision, and contradicted, though not expressly, yet by the current of opinions."

Where a partnership, or an agreement in the nature of a partnership, exists between two persons, and land is acquired by the partnership, as a substratum for such partnership, the land is in the nature of the stock-in-trade of the partnership; and, the partnership being proved as an independent fact, the Court, without regarding the Statute of Frauds, will inquire of what the partnership stock consisted, whether it be of land, or of property of any other nature: *Dale v. Hamilton*, 5 Hare, 369; 2 Ph. 266; and see *Darby v. Darby*, 3 Drew. 495.

Parol agreements, also, although there be no act of part performance, will be taken out of the Statute of Frauds, where the person sought to be bound, admits the contract. Thus, where a bill has been filed for specific performance of an agreement, though not in writing, nor so stated in the bill, if the defendant by his answer, admits the agreement stated in the bill, it takes it entirely out of the mischief the statute was designed to obviate; and, as there would be no danger of perjury, the Court would decree it, and if the defendant should die, upon a bill of revivor against his heir, the principle going throughout, and equally binding the representatives: *The Attorney-General v. Day*, 1 Ves. 221;

Lacon v. Mertins, 3 Atk. 3. However, Lord Bathurst, in *Eyre v. Popham*, Lofft's Rep. 808, 809, thought otherwise.

But, although a parol agreement is admitted by the answer, if the defendant insists upon the Statute of Frauds, it will be a bar to a decree for specific performance: *Moore v. Edwards*, 4 Ves. 23; *Cooth v. Jackson*, 6 Ves. 12; *Rowe v. Teed*, 15 Ves. 375; and *Blagden v. Bradbear*, 12 Ves. 471, where *Sir William Grant, M. R., ob-
[*785] serves, that it is immaterial what admissions are made by a defendant insisting upon the benefit of the statute, for he throws it upon the plaintiff to show a complete written agreement; and it can no more be thrown upon the defendant to supply defects in the agreement than to supply the want of an agreement.

Where, however, a defendant by answer admits an agreement, if he means to rely on the fact of it not being in writing and signed, and so being invalid by reason of the Statute of Frauds, he must say so: otherwise he is taken to mean that the admitted agreement was a written agreement good under the statute, or else that on some other ground it was binding on him (per Lord Cranworth, C., in *Ridgway v. Wharton*, 3 De G. M. & G. 689; *S. C.*, 6 Ho. L. Cas. 238; and see *Hays v. Astley*, 4 De G. Jo. & Sm. 34; 12 W. R. (L. J.) 64). So in *Skinner v. M'Douall*, 2 De G. & Sm. 265, where a defendant by his answer alleged that no formal note of the agreement charged by the bill was made, and denied that any binding agreement ever existed, but he did not expressly claim the benefit of the Statute of Frauds, it was held by Sir J. L. Knight Bruce, V. C., at the hearing that he was not entitled to the benefit of the statute.

If a defendant admits and submits to perform a parol agreement, he cannot afterwards, by an answer to the bill when amended, insist upon the statute: *Spurrier v. Fitzgerald*, 6 Ves. 548.

Where a bill does not allege a sufficient agreement within the Statute of Frauds, the objection may be taken by demurrer. *Wood v. Midgley*, 2 Sm. & G. 115; 5 De G. Mac. & G. 41; *Pain v. Coombs*, 3 Sm. & Giff. 449; 1 De G. & Jo. 34

In almost every State of this Union, the rule is well settled, that, in equity, part performance takes a parol agreement out of the operation of the Statute of Frauds: see *Parkhurst v. Van Cortland*, 14 Johnson, 15, 31; *Welsh v. Bayard*, 6 C. E. Green. 186; *Freeman v. Freeman*, 43 New York, 34; *Hal. and Wife v. Hall et al.*, 1 Gill, 383, 389; *Annan v. Merritt*, 13 Connecticut, 479, 491; *Eaton v. Whitaker*, 18 Id. 222, 229; *Newton v. Swazey et al.*, 8 New Hampshire, 9, 13; *Tilton v. Tilton*, 9 Id. 386, 389; *Farrar v. Patton*, 20 Missouri, 81; *Despain v. Carter*, 21 Id. 331; *The School*

District v. Mectron, 4 Wisconsin, 79; *Dugan v. Colville*, 3 Texas, 126; *Howe v. Rogers*, 32 Id. 218; *Boze v. Davis*, 14 Id. 331; *Clayton v. Frazier*, 33 Id. 91; *Peckham v. Berken*, 8 Rhode Island, 17. Estates for years are within the principle, as well as those of greater duration; and hence, even if a lease were within the clause of the statute which provides that agreements which cannot be performed in a year, must be in writing, it would be taken out of it by the entry of the lessee, and the payment of rent; *Grant v. Ramsay*, 7 Ohio, N. S. 157. In Tennessee, however, part performance is not allowed to have the effect of taking a case out of the statute; and specific performance is never decreed of a parol contract to convey; *Patton v. M'Clure*, Martin & Yerger, 333; *Ridley et al. v. M'Nairy et als.*, 2 Humphreys, 174. And the same rule prevails in Kentucky, unless the possession is accompanied or followed by such a change of position on the part of the purchaser as would subject him to loss for which he could not otherwise have adequate compensation or redress: see *Worley v. Tuggle*, 4 Bush. 168, 190. It is held in like manner in North Carolina, that although there has been part performance, as payment and delivery of possession, yet, if the defendant denies the contract, and insists on the statute, no relief will be afforded in chancery; if he admits the contract and insists on the statute, the court will order an account, and will decree compensation to the plaintiff for his pay-

ments, and expenditures in improvements; *Ellis v. Ellis*, 1 Devereux, Equity, 341, 398; *Albea v. Griffin*, 2 Devereux & Battle's Equity, 9; *Dunn v. Moore*, 3 Iredell's Equity, 364; *Allen v. Chambers*, 4 Id. 125, 130; *Plummer v. Owen*, 1 Busbee, Eq.; *Barnes v. Teague*, 1 Jones, Eq. 277. In Massachusetts and Maine, the equity powers of the courts, by statute, extended only to the specific execution of written contracts; Rev. St. of Mass., c. 81, s. 8; *Dwight v. Pomeroy et al.*, 17 Massachusetts, 303, 327; *Brooks v. Wheelock*, 11 Pickering, 439; Acts of Maine, 1830, c. 462; Rev. St. c. 96, s. 10, *Bubier v. Bubier*, 24 Maine, 42; and they had no jurisdiction to decree specific performance of a parol contract under any circumstances; *Stearns v. Hubbard et al.*, 8 Greenleaf, 320; *Wilton v. Harwood*, 23 Maine, 131; *Jacobs v. The Rail Road*, 8 Cushing, 223.

The jurisdiction has been enlarged in Massachusetts, and extends to relief by way of specific performance, either of contracts wholly unwritten or of stipulations proved by parol, and incorporated into the contract by the judicial rectification of the written instrument; *Metcalf v. Putnam*, 9 Allen, 97; *Glass v. Hulbert*, 102 Massachusetts, 25, 33; *The Stockham Iron Co. v. The Hudson Iron Co.*, Ib. 45.

It is universally agreed, that the ground upon which courts of chancery consider part performance of a parol agreement, as creating an equity to have the agreement,

specifically executed notwithstanding the statute, is, that it would be a fraud upon the party if the transaction were not completed; *Hamilton v. Jones*, 3 Gill & Johnson, 127; *Heth's Ex'or v. Wooldridge's Ex'or*, 6 Randolph, 605, 607; *Carlisle v. Fleming et al.*, 1 Harrington, 421, 430; *Townsend v. Houston*, Id. 532, 540; *Anderson v. Chick*, 1 Bailey's Equity, 118, 124; *Rathbun v. Rathbun*, 6 Barbour's S. Ct. 99, 106; *Despain v. Carter*, 21 Missouri, 331; *Gilmore v. Johnson*, 14 Georgia, 683; *Farrar v. Patton*, 20 Missouri, 81. Nothing, therefore, will be deemed part performance, or held to warrant a decree for the specific execution of an oral contract, which does not place the party in a position which is a fraud, hardship, or imposition on him, unless the contract is performed; *Tilton v. Tilton*, 9 New Hampshire, 386, 390; *M'Kee v. Phillips*, 9 Watts, 85, 86; *Allen's Estate*, 1 Watts & Serg. 383, 385; *Crane v. Gough*, 3 Maryland, Chancery, 119; *Hawkins v. Hunt*, 14 Illinois, 42; *Chambers v. Lecompte*, 9 Missouri, 569; *White v. Watkins*, 23 Id. 423; *Gilbert v. The Trustees*, 1 Beasley, 179, 204. "The ground of the relief in chancery," said Chancellor Kent, in *Parkhurst v. Van Cortland*, 1 Johnson's Chancery, 274, 284, "is the fraud in permitting a parol agreement to be partly executed, and in leading on a party to expend money in the melioration of the estate, and then to withdraw from the performance of the contract. The courts of equity, in their anxiety to guard the party

from the effects of fraud, have been led to some fluctuating decisions on this point of part performance; but the current of cases, both ancient and modern, is pretty uniform and consistent with the principle I have stated, and the tendency of the latter cases is to prefer giving the party *compensation in damages*, instead of a specific performance. Wherever damages will answer the purpose of indemnity, this alternative is to be preferred, as it will equally satisfy justice, and will be in coincidence with the provisions, and in support of the authority of the statute." Moreover, it must be some positive and palpable act, having unquestionable reference to the agreement, and clearly intended to be in execution of it; *Hatcher et al. v. Hatcher et al.*, 1 M'Mullan's Equity, 311, 318; *Smith v. Smith*, 1 Richardson's Equity, 130, 133; *Robertson v. Robertson*, 9 Watts, 32, 42; *Ham v. Goodrich*, 2 Fogg, 32; *Davis v. Moore*, 9 Richardson, 215; *Peckham v. Barker*, 8 Rhode Island, 17. "It is well settled, that if a party sets up part performance, to take a parol agreement out of the statute, he must show acts unequivocally referring to, and resulting from, *that* agreement; such as the party would not have done, unless on account of that very agreement, and with a direct view to its performance; and the agreement set up must appear to be the *same* with the one partly performed. There must be no equivocation or uncertainty in the case. The ground of the in-

terference of the court is not simply that there is proof of the existence of a parol agreement, but that there is *fraud* in resisting the completion of an agreement partly performed." *Phillips v. Thompson*, 1 Johnson's Chancery, 131, 149; *Anthony v. Leftwich*, 3 Randolph, 238, 247, 277; *Moore v. Small*, 7 Harris, 461; *Cox v. Cox*, 2 Casey, 375. Acts which are applicable to something else than the parol agreement, will not be part performance of it; *Duval v. Myers*, 2 Maryland, Ch. 20. If, for example, a tenant claiming specific performance of a parol agreement to renew a lease, has merely done acts which it was his duty to do under the old lease, they will not be sufficient; *Bryne v. Romaine*, 2 Edwards, 445, 446.

There is no doubt that the delivery of possession, or the vendee's entry with the vendor's consent, and the making of valuable improvements, will be such part performance as will entitle the vendee to a specific execution; *Parkhurst v. Van Cortland*, 14 Johnson, 15; *Wetmore v. Whites*, 2 Caine's Cases, 87, 109; *Moreland v. Lemasters*, 4 Blackford, 383, 385; *Byrd v. Odem*, 9 Alabama, 756, 764; *Finucane v. Kearney et al.*, 1 Freeman, 65, 69; *Simmons v. Hill et al.*, 4 Harris & M'Henry, 252; *Newton v. Swazey et al.*, 8 New Hampshire, 9, 14; *Ottenhouse v. Burleson*, 11 Texas, 87; *Johnson v. M'Gruder*, 15 Missouri, 365; *Despain v. Carter*, 21 Id. 331; *Dugan v. Colville*, 8 Texas, 126; *Mimms v. Lockett*, 33 Georgia, 9. In like manner, payment

of the purchase-money, and being let into possession are sufficient; *Dugan et al. v. Gittings et al.*, 3 Gill, 140, 157; *Thornton v. Heirs of Henry*, 2 Scammon, 219, 220; *Shirley v. Spencer*, 4 Gilman, 583, 600; *Finucane v. Kearney et al.*, Freeman, 65, 68; *Lessee of Billington v. Welsh*, 5 Binney, 129; *Haines v. Haines*, 6 Maryland, 435. And, though of the foregoing cases, some connect the making of improvements, and others the payment of the purchase-money, with the entry into possession, yet it is certain that neither of those circumstances is necessary; and possession, though it is strengthened by payment or improvements, is, alone, sufficient to constitute part performance. Delivery of possession, or entry into possession with consent of the vendor, under the contract and in pursuance of it, will entitle the vendee to specific performance of a parol contract; and the reason is said to be, that if the contract were avoided, he would become liable as a trespasser; *Eaton v. Whitaker*, 18 Connecticut, 222, 229; *Tilton v. Tilton*, 9 New Hampshire, 386, 390; *Allen's Estate*, 1 Watts & Sergeant, 383, 386; *Pugh v. Good*, 3 Id. 56, 61; *Johnston v. Glancy*, 4 Blackford, 94, 98, *ante*. [The language held in *Galbreath v. Galbreath*, 5 Watts, 146; *Woods v. Farmere*, 10 Id. 195; and *Dugan v. Blocher*, 12 Harris, 18, is at variance with this conclusion, and tends to show that possession will not remove the bar of the statute, unless attended or followed by the payment of the pur-

chase-money, or by expenditures on the land. But as the case of the complainant was defective in other particulars, in each of these instances, the point was not necessarily before the court in any of them, and the weight of authority, both in this country and in England, would seem to be in favor of the proposition, that possession taken, under and in pursuance of a parol contract, will warrant a decree for a specific performance, even when the case rests solely upon the contract and the possession, and no payment has been made of any portion of the consideration, *ante*; *Jones v. Peterman*, 3 S. & R. 543, 549; *Allen's Estate*, 1 W. & S. 383, 386. But to produce this effect, the possession must be actual, or at least not merely nominal, and must be such as to justify the presumption that the purchaser will be irreparably injured if the contract be not fulfilled; *White v. Watkins*, 23 Missouri, 423.]

But although delivery of possession seems to be sufficient, in case of a sale for valuable consideration, a distinction exists in regard to parol gifts. "To take a parol contract out of the statute," said the court, in *Stewart v. Stewart*, 3 Watts, 253, 255, "it is necessary not only that it be partly performed by delivery of the possession, but that it be on a valuable consideration paid, or secured to be paid; or in the case of a gift, that there be an expenditure of money or labor in consequence of it, which comes to the same thing; and this for the plain reason that

no equity arises from the naked delivery of the possession, and without a specific equity a chancellor would not interfere to compel a conveyance or execution of the contract." Hence, equity will not enforce an oral gift of land by a father to a son, although attended or followed by possession, unless valuable improvements are made by the donee, or there are other circumstances which render a specific performance essential to the purposes of justice; *Pinckard v. Pinckard*, 23 Alabama, 649; *Eckert v. Eckert*, 3 Penn. 332; *Eckert v. Mace*, *Ib.* 364, note. It is not to avoid the Statute of Frauds, however, that a consideration is necessary: equity does not decree the execution of any contract, written or oral, unless there be a valuable consideration, or a meritorious consideration aided by an instrument under seal; *ante*, 324. The contract must not only be partly performed, but for a valuable consideration; a valuable consideration being essential to the specific execution of any contract, and part performance necessary to obviate the Statute of Frauds.

Valuable improvements induced by a parol contract, and in execution of it, will, however, be regarded in equity as a valuable consideration for the purposes of a specific execution; *France v. France*, 4 Halstead, Ch. 650; *Lobdell v. Lobdell*, 36 New York, 558; *Bright v. Bright*, 41 Illinois, 101. See *Syler v. Eckert*, 1 Binney, 378; *M'Clure v. M'Clure*, 1 Barr, 374, and *Eckert v. Mace*, 3 Pen.

& Watts, 364, note. [The right to enforce oral gifts, was, nevertheless questioned in *Moore v. Small*, 7 Harris, 461, 469; while in *Ridley v. M'Nairy*, 2 Humphreys, 174; *Boze v. Davis*, 14 Texas, 351; *Forward v. Armstead*, 12 Alabama, 124; *Evans v. Battle*, 9 Id. 398, and *Pinckard v. Pinckard*, 23 Id. 649, the court refused to protect the donee, although he had gone into possession, and made valuable improvements on the faith of the gift. See *Neale v. Neale*, 9 Wallace, 1, 10.

It seems to have been overlooked in these instances, that in decreeing the execution of an oral contract which has been partly performed, equity relies not on the contract, which falls within the statute, but on the acts done under it subsequently, on the faith of its terms, and that this reason applies with the same force, when a gift has led to the expenditure of money or labor on the land and will, consequently, operate as a fraud on the donee, unless executed by a conveyance. A license to enter upon or occupy land, is a limited and partial donation of an easement or privilege in the land; and yet nothing is better settled, at least in Pennsylvania, than that a license cannot be rescinded after it has been executed; *Rerick v. Kern*, 14 S. & R. 267; 2 Am. Lead. Ca. 570, 5th ed. The better opinion would, therefore, seem to be that a parol gift of land which has been followed by acts or expenditures on the part of the donee, which would render a revocation of the gift unjust or inequitable, may be

upheld and enforced; *Saco v. Henry*, 39 Indiana, 414; *Neale v. Neale*; *Galbreath v. Galbreath*, 1 Kansas, 402; *Syler v. Eckhart*, 5 Binney, 308; *Young v. Glendenning*, 6 Watts, 309; *Mahon v. Baker*, 2 Casey, 519; *Atkinson v. Jackson*, 8 Indiana, 30; although equity will not interfere, where the outlay has been trivial, or does not appear to have been induced by or founded upon the gift, nor when it has been compensated by the past profits of the land, or admits of an adequate compensation from other sources; *Wack v. Sorber*, 2 Wharton, 387. "Slight and temporary erections," said Gibson, C. J., in *Glendenning v. Wood*, "for the tenant's own convenience, give no equity, but an indefeasible right may grow out of permanent improvements;" *Neale v. Neale*. 9 Wallace, 1.

The cases of *King v. Thompson*, 9 Peters, 204, and *Runker v. Abell*, 8 B. Monroe, 566, tend to sustain the same view of the question, and to show that oral gifts may be rendered irrevocable in equity by an outlay on the land; at all events, where the donor stipulates that the improvement shall be made, and thus renders it the consideration or condition of the gift; and the law has been so held in Maryland and Pennsylvania and by the Supreme Court of the United States; *Burns v. Sutherland*, 7 Barr, 103; *Young v. Glendenning*, 6 Watts, 509; *Haines v. Haines*, 4 Maryland Ch. 133; 6 Maryland, 435; *Neale v. Neale*. So possession attended with improvements, may supply the want of written

evidence of a contract to convey in consideration of marriage, although no compensation is received by the donor; *Neale v. Neale*. See *Montefiore v. Montefiore*, 1 W. & Bl. 363. When, moreover, the gift cannot be specifically enforced from uncertainty as to the interest meant to be conferred, or from any other cause, the donee may claim reimbursement for expenditures made on the faith of the promise of the donor; *King v. Thompson*; and this was somewhat inconsistently admitted in *Evans v. Battle*, 19 Alabama, 398, and *Boze v. Davis*, 14 Texas, 331, although the possibility of a valid oral gift was denied. But it must be remembered, that while a gift without writing will fall directly within the statute, unless money or labor has been expended on the land, such expenditure will be unavailing unless shown to have been induced by or made in consequence of a prior contract or donation; *Eckert v. Eckert*, 3 Penna. 332; *West v. Flannigan*, 4 Maryland, 36. The gift must be proved clearly and distinctly, and the proof that the donee actually expended money under and on the faith of it, be of equal clearness; the possession and improvement of land, being, in themselves, wholly insufficient to give birth to an equity, or take the case out of the statute; *Hugus v. Walker*, 2 Jones, 173.

A parol license to lay out a way or water-course, or even to erect a permanent structure on the land of another, falls, as already stated, within the same principle as a gift

or contract, and may be specifically enforced wherever it has been so far acted upon or executed, that irreparable injury would result from its withdrawal; *Pope v. Hay*, 24 Vermont, 560; *Swartz v. Swartz*, 4 Barr, 353; *M'Itheney v. M'Itheney*, 4 Watts, 317; *Sheffield v. Collier*, 3 Kelly, 82; *Wynn v. Garland*, 19 Arkansas, 23; 3 American Leading Cases, 570, 5th ed.]

The possession, to amount to part performance, must be connected with the contract, and must be in consequence and in pursuance of it, and intended to be in execution of it; *Anderson v. Chick*, 1 Bailey's Eq. 118, 124; *Hood et al. v. Bowman et al.*, Freeman's Chancery, 290, 293; *Robertson v. Robertson*, 9 Watts, 32, 42; *Stoddard v. Tuck*, 5 Maryland, 184; 4 Maryland Chancery, 475; [and must, it has been said, be maintained continuously down to the time at which relief is sought in equity; *Dougan v. Blocher*, 12 Harris, 28; *Munsdorf v. Howard*, 4 Maryland, 459. The possession must be taken under, and by virtue of the contract, and not be a mere continuation of the state of things which existed previously; *Poag v. Sandifer*, 5 Richardson's Equity, 170; *Jones v. Peterman*, 3 S. & R. 543; *Christy v. Barnhart*, 2 Harris, 260; *Aitkins v. Young*, 2 Jones, 15; nor an anticipation of a right which is yet to come, and which, in point of fact, is not given until a subsequent period; *Eckert v. Eckert*, 3 Penna. 332. The entry into possession must, therefore, be contemporane-

ous with, or subsequent to the contract, and the prolongation of a prior possession can seldom, if ever, be sufficient; *Christy v. Barnhart*; *Aitkins v. Young*. Hence, a suit to compel the execution of a contract, as finally completed, cannot be sustained by proof of possession taken when the negotiations were began; *Dougan v. Blocher*, 12 Harris, 28; nor will the continuance in possession, of a tenant after the term, warrant the specific performance of an alleged agreement, for the renewal of the lease or the purchase of the reversion; *Jones v. Peterman*; *Christy v. Barnhart*; *West v. Flannigan*, 4 Maryland, 36; *Workman v. Guthrie*, 5 Casey, 495, 572; *Cole v. Polts*, 2 Stockton's Ch. 67; except, perhaps, where alterations and improvements of a permanent nature have been made with the knowledge of the landlord, which exceed the right given by the lease, and consequently, tend to substantiate the allegation that the term has been merged in a new or additional interest; *Mahon v. Baker*, 2 Casey, 519; although evidence of this description is obviously dangerous, and ought to be scrutinized with the utmost care; *West v. Flannigan*. The possession, must, moreover, be so far exclusive, as to show that it is the possession of the purchaser, and not of the vendor, and evince the birth of a new estate, as distinguished from the continuation of that which existed previously; *Haslet v. Haslet*, 6 Watts, 464; *Robertson v. Robertson*, 9 Id. 32, 41; *Frye v. Shipler*, 9 Barr, 91.

Hence, when the bill is filed by a tenant in common, or other party, who would be entitled to enter, if there were no contract, a specific performance will not be decreed unless the possession is such as to show that the complainant has acquired an exclusive right to the land; *Ellis v. Ellis*, 1 Dev. Ch. 180; *Workman v. Guthrie*, 5 Casey, 495, 512; *Galbreath v. Galbreath*, 5 Watts, 146; *Blakeslee v. Blakeslee*, 10 Harris, 257. "What, then? it may be asked," said Woodward, J., in delivering the opinion of the court, in *Workman v. Guthrie*, "can there be no sale of land by parol, among tenants in common, where all are in possession? Certainly not; because the Statute of Frauds and Perjuries forbids it, and there cannot be such part performances as would take it out of the operation of that wise and salutary rule of titles." What is here said where tenants in common are in possession, would seem equally true where they are not; the possession of each being the possession of all; and an entry by one having no tendency to substantiate the existence of a sale to him by the others; because it might equally be made, by virtue of his antecedent right. Exclusive possession is an indispensable ingredient in a suit for the specific performance of an oral agreement, for the sale of land, and the complainant must show, not only that he took possession, but that he took it in pursuance, and in execution of the agreement; *Goucher v. Martin*, 9 Watts, 106, 109; *Haslet v. Haslet*, 6 Id. 464. And

in *Blakeslee v. Blakeslee*, 10 Harris, 237, the court said, that to give a right to specific performance the possession of the vendee must be exclusive of and not concurrent with the vendor.

It is well settled, that when tenants in common or co-parceners divide the land *in pais* or by parol, and each takes exclusive possession of his share, the case is not within the statute, and a chancellor may direct a specific performance; *Wilkey v. Bonney*, 31 Miss. 634; *City of Natchez v. Vandervelde*, Ib. 706, 720; *Corbin v. Jackson*, 14 Wendell, 619; *Slize v. Derrick*, 2 Richardson, B. 7; *Pratt v. Hubbell*, 3 Ohio, N. S. 243. So the parol compromise or adjustment of a controversy as to boundary or title between the owners of adjacent tracts of land, may be valid, if accompanied and followed by possession; 2 Smith's Lead. Cases, 731 7 ed.; *The City of Natchez, v. Vandervelde*.

An attornment by the vendor's tenant, with his assent, will, it seems, be a sufficient change of possession; *Williams v. Landman*, 8 W. & S. 60; *Pugh v. Good*, 3 Id. 56; although it may be rebutted by proof of the subsequent payment of rent to the vendor, with the assent of the purchaser; *Brawdy v. Brawdy*, 7 Barr, 157. Possession of one tract of land, has been held insufficient to take another and distinct tract out of the statute, where both are sold separately, although at the same auction; *Buckmaster v. Harrop*, 9 Vesey, 341; Sugden on Vendors, 125, 9th ed.; or even when the

contract of sale is entire, and extends to both; *Allen's Estate*, 1 W. & S. 383; although the latter point is said to be held the other way in England; *Dock v. Hart*, 7 W. & S. 172; but when the agreement was, that a father should purchase one tract, with money belonging to his son, and that the son should take another tract belonging to the father, as an equivalent for the first, the possession of the first tract by the father, and the assessment of the second in the name of the son, were held to take the contract out of the statute, although the son did not go into actual possession; *Lee v. Lee*, 9 Barr, 169. The case of *Croker v. Higgins*, 7 Conn. 342, goes further, by deciding that the execution of a deed from A. to B., is sufficient to warrant a decree for the specific performance of an agreement between A. B. and C., that if A. would convey to B., he would, thereupon, lease the land so conveyed to C.; the ground taken being, that accepting the land without giving the lease, was a fraud, which required the interposition of equity. But a contract, that if B. will execute a deed to C., A. will convey to B., will not, it has been said, be taken out of the statute, as against A., by the execution of the deed from B. to C.; *Chambers v. Lecompte*, 9 Missouri, 575. There can be little doubt of the soundness of this decision, because to take a contract for the sale or conveyance of land, out of the statute by performance, the performance must be on or about the land in question, and be so far

founded upon the contract, that it would be wrongful had no contract been made. Hence, an oral agreement between the owners of two adjacent lots, that each shall build upon the same line a certain number of feet back from the street, will not be rendered binding by the erection of a building on one of the lots, in compliance with the agreement, because this might obviously have been done, without an agreement, and consequently does not show that an agreement exists; *Wolfe v. Frost*, 4 Sandford's Chancery, 712. For the same reason, improvements by a tenant will be referred to his right under the lease, and not to that which he attempts to set up, as a purchaser: *West v. Flanigan*, 4 Maryland, 36; unless sufficient evidence is adduced to shift the burden of proof, and raise a presumption of an opposite nature; while it would seem doubtful, whether the possession of a railroad company, who are authorized by their charter to enter on land, will suffice to give effect to a private oral agreement, between them and the owner; *Jacobs v. The Railroad*, 8 Cushing, 223.

In like manner, possession under a father, or other near relative, who stands in *loco parentis*, has been held insufficient to take a contract out of the statute, although attended by the erection of valuable improvements, because the relation between the parties tends to rebut the presumption, which would have arisen, had the parties been strangers; *Poorman v. Kilgore*, 2 Casey, 365; *Cox v. Cox*, Ib. 375; *M'*

Clure v. Johnson, 1 Id. 306; and the case of *Ham v. Goodrich*, 33 New Hampshire, 32, may be cited in support of the same view of the question.]

If the party's possession has no relation to the agreement, but is on a distinct title, it will not be part performance; *Smith v. Smith*, 1 Richardson's Equity, 130, 133, 136: indeed, if it can, fairly and reasonably, be accounted for, without supposing that there was a gift or an agreement to sell, such mere possession will not be a sufficient performance; *German v. Machin*, 6 Paige, 289, 293; *Poorman v. Kilgore*; *Cox v. Cox*.

[The contract must be proved as it has been laid, and the possession and other acts of performance must pursue and substantiate the contract; *The Chesapeake and Ohio Canal v. Young*, 3 Maryland, 480; *Munsdorf v. Howard*, 4 Id. 459; *Ham v. Goodrich*, 33 New Hampshire, 32; so that the *allegata* and *probata*, may together make a consistent whole, and render it apparent that the alleged agreement between the parties, has been ascertained and executed by their acts. The possession must clearly appear to have been taken by the known permission of the vendor; and if it be against or without his permission, it will not be availing: but an entry into, and continuance in possession with the knowledge and acquiescence of the vendor, would reasonably be evidence of his consent; *Lord v. Underdunk*, 1 Sandford, 46, 48; *Jervis v. Smith and others*, Hoffman, 470, 475; *Thomp-*

son v. Scott and Bostick, 1 McCord's Chancery, 32, 39. If possession be taken and continued under the contract, and in consequence of it, and with the vendor's assent, it will be a sufficient part performance, though it be not in pursuance of a provision in the contract; it is enough, that the possession is an act which could not be done with any other view than that of performing the agreement; *Harris v. Knickerbocker*, 5 Wendell, 638, 644; *Smith v. Underdunk*, 1 Sandford, 579, 582. In Pennsylvania, possession must, moreover, be delivered in the lifetime of the vendor; *Sage v. McGuire*, 4 Watts & Serg. 228, 229.

[It is accordingly laid down as a general principle, that to take a contract out of the statute, on the ground that it has been acted upon, the contract must be evinced and substantiated by the act, and the act appear to have been done in pursuance of the contract; *Stoddard v. Tuck*, 5 Maryland, 18; *Mumsdorf v. Howard*, 4 Id. 459; *Gough v. Cram*, 3 Maryland Chancery, 132; *Duval v. Myers*, 2 Id. 401; *Lester v. Renne*, 37 Conn. 91; *White v. Watkins*, 23 Missouri, 423, 428.

The requisites to a decree on the ground of part performance were enumerated in *Wright v. Packet*, 22 Grattan, 374. "1st. The parol agreement relied on must be certain and definite in its terms. 2nd. The acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved. 3d. The agreement must have been so far executed

that a refusal of full execution operate a fraud upon the party, and place him in a situation which does not lie in compensation. Where these three things concur, a Court of Equity may decree specific execution. Where they do not, it will turn the party over to seek compensation in damages in a court of law."

In *Dougan v. Bloucher*, 12 Harris, 34, Woodward, J., said; "that the possession taken after the sale of the personal property, and before the sale of the land, could not be part performance of the contract, because it was not taken in pursuance of it, and even if it had been, was not maintained. Possession, to be part performance, must be taken under, and in pursuance of the contract, and it must be maintained as it is taken; and unless accompanied by such improvements as will not reasonably admit of compensation in damages, is not, even when so taken and maintained, such part performance of a parol contract as will take it out of the statute of frauds."

In *Johnson v. Hubbell*, 2 Stockton's Chancery, 332, the chancellor was, notwithstanding, of opinion, that an oral promise by a father to a son, in the presence of a daughter, to devise land to the son, in consideration of an immediate conveyance by the latter, of other land to the daughter, might be taken out of the statute, with regard to the land to be devised, by the execution of the conveyance: although it is difficult to understand why payment in land should give a higher or better equity than

payment in money, which is admitted on all sides not to warrant a specific performance; *ante*. And in *Rhodes v. Rhodes*, 3 Sandford's Chancery, 279, an agreement between two brothers, that one should maintain and take care of the other, who was epileptic, till he died, in consideration of receiving a conveyance of all his property, was specifically enforced, on proof that the epileptic had been faithfully nursed and maintained while he lived, although no entry had been made, nor any act of part performance done on the land to be conveyed; but the hardship of the case may have influenced the judgment of the vice-chancellor, and the decision is anomalous, if not questionable. Some doubt may also be entertained, as to the soundness of the decree in *Gough v. Crane*, 3 Maryland Chancery, 119; 4 Maryland, 316; where the delivery to an intended husband, of bonds and notes belonging to the wife, was held to take an oral agreement, that they should be his absolutely, out of the statute, although he would, obviously, have been entitled to the custody of his wife's *choses in action*, had no contract been made, by virtue of his marital interest and authority. There is, however, no reason to doubt, that a *tripartite* agreement between A., B., and C., that if C. will purchase an estate from B., which has been mortgaged to A., and apply the purchase-money in part payment of the mortgage, the land shall be released as soon as the payment is made, may be specifically

enforced against A., on proof that C. went into possession under the agreement, and that the purchase-money was paid, to A., as stipulated, because the payment and possession together, show that A. is a party to the contract, although either might be insufficient, if taken separately; *Malins v. Brown*, 4 Comstock, 403.

Possession does not exonerate the purchaser from the obligation of good faith and diligence, and an unreasonable delay or refusal on his part, will be a defence to a bill for the specific performance of the contract: *M'Clellan v. Darragh*, 50 Illinois, 249; *Dougan v. Bloucher*, 12 Harris, 28, 33.]

Where the contract is entire and indivisible, though relating to different parcels of land, the taking possession of one parcel, has been held in New York to be a sufficient performance of the whole; *Smith v. Underdunk*, 1 Sandford, 579, 581; and this appears to be the more correct view; but in Pennsylvania, the point has been differently decided, and such part possession held insufficient as to the whole; *Allen's Estate*, 1 Watts & Sergeant, 384, 389: see *Pugh v. Good*, 3 Id. 56, 61: and it would seem also to be inoperative as to the part, for want of an antecedent contract to which it could be applicable, the original contract being entire; see *M'Clure v. M'Clure*, 1 Barr, 374, 379. Some of the Pennsylvania cases declare that the possession must be definite in its limits, exclusive and notorious; *Haslet v. Haslet*, 6 Watts, 464; *Fryer v. Shepler*, 7 Barr, 91,

93; *Brawdy v. Brawdy*, Ib. 157, 161.

But though entry into possession with the vendor's consent, by a purchaser who was previously not in possession, is a part performance, yet continuance in possession by a tenant who was in possession of the premises at the time of the contract, will not be considered as part performance; *Johnston v. Glancy*, 4 Blackford, 94, 99; *Anthony v. Leftwitch*, 3 Randolph, 238, 256; *Hatcher et al. v. Hatcher et al.*, 1 M'Mullan's Equity, 311, 318. See also, *Smith v. Smith*, 1 Richardson's Equity, 130; and *Brawdy v. Brawdy*, 7 Barr, 157, 161. [But the payment of an increased rent on the basis of an agreement for a renewal of the lease may suffice to take the case out of the statute; *Spear v. Ormsdorf*, 26 Maryland, 37; *Wells v. Shedling*, 3 Vesey, 378, *ante*. On the other hand, in *Rosenthal v. Freeburger*, 26 Maryland, 75, the Court refused to execute an oral agreement for a lease between a tenant and a purchaser from the lessor, although the tenant, remained in possession for three months after the respondent acquired the title, and paid rent in accordance with the terms of the agreement.]

Possession taken by the vendee's lessee, is the vendee's possession, and will be part performance; *Pugh v. Good*, 3 Watts & Sergeant, 56, 63; and if the land is in the possession of a tenant at the time of the sale, and the vendor agrees that the rent shall be paid to the vendee, and the tenant at-

torns to the vendee, that is a sufficient delivery of possession, according to *Williams v. Landman*, 8 Watts & Sergeant, 56, 60.

It is fully settled at the present day, that payment of the purchase-money is not of itself sufficient to withdraw a parol agreement from the operation of the statute, because the money may be recovered back at law; *Smith v. Smith*, 1 Richardson's Eq. 130, 132, 135; *Eaton v. Whitaker*, 18 Connecticut, 222, 229; *Finucane v. Kearney et al.*, 1 Freeman's Chancery, 65, 68; *Hood v. Bowman et al.*, Ib. 290, 294; *M'Kee v. Phillips*, 9 Watts, 85, 86; *Parker v. Wells*, 6 Wharton, 153, 161; *Allen's Estate*, 1 Watts & Sergeant, 383, 389; *Rankin v. Simpson*, 7 Harris, 471; *Parke v. Dwight*, 20 Missouri, 85; *Ham v. Goodrich*, 33 New Hampshire, 32, 39; *Black v. Black*, 15 Georgia, 445; *Purcell v. Miner*, 4 Wallace, 513; *Thompson v. Gould*, 20 Pick. 134; *Glass v. Hulburt*, 104 Mass. 24; *Green v. Stubblefield*, 5 Texas, 561; *Wood v. James*, 35 Id. 63. Formerly, however, the opinion was, that payment of the whole, or a substantial part of the purchase-money, would be a part performance in equity; *Witmore v. White*, 2 Caines' Cases, 87, 109; and that was adhered to by Johns, C., in *Townsend v. Houston*, 1 Harrington, 532, 541: and it seems that chancery may where the personal assets are insufficient, fasten an equitable lien or charge on the land; *Sneed v. Bradley*, 4 Sneed, 301, 305.

If the consideration of the sale be not money, but labor and ser-

vices, it may depend upon circumstances whether the execution of the contract by the vendee would be a sufficient part performance to take the case out of the statute. If the labor and services can be estimated and compensated in money, so as to make the vendee whole by damages, they would not be: but where the circumstances are of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and it is obvious that they were not intended to be measured by such a standard, it would be impracticable to restore the party to the situation he was in before, or to give him a compensation in damages; and the case comes within the rule which applies where possession has been taken, or money been laid out in improvements; *Rhodes v. Rhodes*, 3 Sandford, 279, 284; *Van Duyne v. Vreeland*, 1 Beasley, 142, 151. See *Hill v. Gomme*, 1 Beavan, 541.

[In *Rhodes v. Rhodes*, it was said to be settled, "that the payment of the consideration will not, in general, be deemed such a part performance as to relieve a parol contract from the operation of the statute. But the reason for this, viz., that in such a case the repayment of the consideration will place the parties in the same situation in which they were before, shows that the rule applies to a monied consideration only. If the consideration for the contract be labor and services, those may sometimes be estimated, and their value liquidated in money, so as

measurably to make the vendee whole, on rescinding the contract. But in a case like this, where the services to be rendered were of such a peculiar character that it is impossible to estimate their value to the complainant by any pecuniary standard, and where it is evident, that he did not intend to measure them by any such standard, it is out of the power of any court, after the performance of the services, to restore the complainant to the situation in which he was before the contract was made, or to compensate him in damages." The cases of *Jack v. M'Kee*, 9 Barr. 235, and *Magee v. M'Dowell*, 9 Harris, 417, would stand better on this ground than on that taken by the court.

Agreeably to the authorities in Pennsylvania nothing but delivery of possession will entitle the party to a specific execution: *Peifer v. Landis*, 1 Watts, 392; *M'Kee v. Phillips*, 9 Id. 85, 86; [while it was intimated in *Moore v. Small*, 7 Harris, 461, 476, and *Dougan v. Blocher*, 12 Id. 28, that the rule ought to be still further narrowed, and a specific performance refused, unless the possession is taken under circumstances which preclude the possibility of compensation in money, and would render it inequitable and unjust not to enforce the contract specifically. Such is the established rule in Massachusetts: *Glass v. Hubbert*, 102 Mass. 25, 32. The argument for the opposite doctrine, that the purchaser may be made answerable as a trespasser, unless the contract is enforced, is fallacious, because a

license is a defence for acts done under it while unrevoked; 2 American Lead. Cases 564, 5 ed. If the question were *res integra*, it would probably be held that an insolvent vendor who procures the payment of the purchase-money by a promise to convey, and then refuses to give a deed, does a greater wrong than a vendor who re-enters on a purchaser who has gone into possession without payment. In *Glass v. Hubbert*, Wells, J., said, that a parol sale, with permission to the purchaser to enter, though not to be enforced as a valid contract of sale, was still a license, which protected the party from liability for acts done before the license was revoked, and for all acts necessary to enable him to remove himself and his property from the premises after such revocation. Possession taken without such permission, express or implied, was no foundation for relief in equity, according to any of the authorities. It has also been held that the possession must not only be visible and notorious, but maintained down to the filing of the bill; and that an actual or constructive surrender of possession, as by taking a lease from the vendor or attorning to him as a tenant, will preclude the right to a specific performance of an oral agreement, by putting an end to the only ground on which it rests; *Brawdy v. Brawdy*, 7 Barr, 157.]

Delivering an abstract of the title, or giving instructions to prepare a deed, will not take a case out of the statute, though they may aid the evidence of an agree-

ment; *Smith v. Smith*, 1 Richardson's Equity, 130, 138.

An agreement to sign a written instrument, which the party is prevented by death from doing, was held to be sufficient to entitle to authorize a specific performance in *Finucane v. Kearney et al.*, 1 Freeman, 65, 69, *ante*, 1041. "An acknowledged exception to the statute," said the chancellor, in that case, "is where the agreement is intended to be reduced to writing according to the statute, but is prevented by the fraud of one of the parties. And so I apprehend the rule would be, where, as in this case, the contract was written out, and one of the parties promised to sign it, but was prevented by inevitable accident. It is the peculiar province of courts of equity to relieve against accident as well as fraud." The same point was determined in *Bernard v. Flinn*, 8 Indiana, 204. The principle is the same where, through a mistake in the wording of the writing, it does not express the contract, or where it is not reduced to writing in consequence of the fraud of the respondent, or where a material provision is fraudulently omitted or erased; *post*, vol. 2, notes to *Woollam v. Hearn*; see *Glass v. Hubbert*, 102 Mass. 24, 39. It is a general rule that the statute being designed for the prevention of fraud, shall not be pleaded as a defence for fraud. 2 Story's Equity, 57, 68; *Wil-link v. Vanderveer*, 1 Barbour, 599; *Miller v. Cotten*, 5 Georgia, 346; *Shields v. Trammell*, 19 Arkansas, 51; *Trapnell v. Brown*,

Ib. 39; *ante*, 221, 274; *post*, vol. 2, note to *Woollam v. Hearn*.

To render the delivery of possession effectual, there must be an antecedent contract of which it is the partial or entire execution: *Eckert and others v. Eckert and others*, 3 Penrose & Watts, 332, 357; and part performance will not take a parol agreement out of the statute, unless the terms of the agreement distinctly appear, or are made out to the satisfaction of the court; if the contract be vague or uncertain, or if the evidence of it be unsatisfactory, a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy: *Parkhurst v. Van Cortland*, 1 Johnson's Chancery, 274, 284; *German v. Machin*, 6 Paige, 288, 292; *Lobdell v. Lobdell*, 36 New York, 327; *Anthony v. Leftwich*, 3 Randolph, 238, 246; *Colson v. Thompson*, 2 Wheaton, 336, 341; *Miller and others v. Cotten and others*, 5 Georgia, 341, 351; *Wallace v. Brown*, 2 Stockton's Ch. 308, 311; *Brewer v. Wilson*, 2 C. E. Green, 180; *Min-turn v. Bayles*, 33 California, 329; *Stoddari v. Tuck*, 5 Maryland, 18; *The Church of the Advent v. Far-row*, 7 Richardson's Eq. 73, 78; *Allen v. Chambers*, 4 Iredell's Eq. 125, 128; *Thomson v. Scott and Bostick*, 1 M'Cord's Chancery, 32, 38, 39; *Massey v. M'Ivain and others*, 2 Hill's Chancery, 421, 426; *Hatcher et al. v. Hatcher et al.*, 1 M'Mullan's Equity, 311, 315; *Newton v. Swazey et al.*, 8 New Hampshire, 9, 13; *Tilton v. Tilton*, 9 Id. 386, 391; *Carlisle v.*

Fleming et al., 1 Harrington, 421, 431; *Townsend v. Houston*, Ib. 532, 545; *Brown v. Finney*, 3 P. F. Smith, 373; *Sage v. M'Guire*, 4 Watts & Sergeant, 228, 229; *Charnley v. Hansbury*, 1 Harris, 16, 21; *Moore v. Small*, 7 Harris, 461, 470; *Rankin v. Simpson*, 7 Id. 471; *M'Curd v. Johnston*, 1 Casey, 306; *Printup v. Mitchell*, 7 Georgia, 558; *Cox v. Cox*, 2 Casey, 375. [In *Cox v. Cox*, the court said that the plaintiff must state his case as he means to prove it, and then prove it as it has been stated; and cannot allege different or inconsistent stipulations or agreements, and then leave the court to decide which is substantiated by the evidence. The location and boundaries of the land, must also be clearly made out; *Robertson v. Robertson*, 9 Watts, 32, 42; *Woods v. Farmere*, 10 Id. 195, 205, 207; *Moore v. Small*, 7 Harris, 461, 470; and though the parties have agreed in all other points, if they have not come to terms on these, there is no contract which a chancellor will enforce, or that can be a ground for damages at law: *The Camden and Amboy Railroad v. Stewart*, 3 C. E. Green, 489. It is enough, however, if the terms and subject matter of the contract can be ascertained with reasonable certainty from the evidence as a whole; *Rhodes v. Rhodes*, 3 Sanford, 279, 281; *Parkhurst v. Van Cortland*, 14 Johnson, 15, 37; *Burns v. Southerland*, 7 Barr, 103, 106; *Neele v. Neele*, 9 Wallace, 1, 12; *Hooper v. Laney*, 39 Alabama, 338.]

In answer to a bill for specific performance of a written agreement, the defendant may prove by parol evidence, that the written instrument sought to be enforced against him, does not truly express the agreement or the whole of it, but through fraud, surprise or accident, varies from the intention or understanding of the parties; *Best v. Stow*, 2 Sanford, 298, 300; *Dwight v. Pomeroy et al.*, 17 Massachusetts, 303, 328; *Brooks v. Wheelock*, 11 Pickering, 439, 440. Ordinarily, a complainant cannot, even in case of part performance, resort to parol proof, in explanation of, or addition to, or as a substitute for, an existing written agreement; because a written agreement is generally taken to contain the contract of the parties, and because a contract cannot rest partly in writing and partly in parol. See *Parkhurst v. Van Cortland*, 1 Johnson's Chancery, 274, 283; *Heth's Ex'r v. Woolbridge's Ex'r*, 6 Randolph, 605, 610; *Kay and Cassey v. Curd, &c.*, 6 B. Monroe, 100, 103; see also *Dwight v. Pomeroy et al.*, and *Brooks v. Wheelock*. But fraud and mistake suspend the application of this rule in equity. Where a written agreement is accompanied by other stipulations in parol, under circumstances which would make the insisting on the written matter alone, a fraud, a complainant may claim the benefit of the parol matter in connection with the written, and the court will, under such circumstances, disregard the writing as containing the contract, and treat the whole trans-

action as a verbal contract; and then, if there has been a part performance, it may, upon that basis, receive parol proof of the whole agreement, independently of the writing or in connection with it, in order to make out the contract. *Phyfe v. Wardell*, 2 Edwards, 47, 50, 51; *Parkhurst v. Van Cortland*, 14 Johnson, 15: see *Dock v. Hart*, 7 Watts & Sergeant, 172; and *Coles v. Bowne*, 10 Paige, 527, 535. Mistake, clearly made out, will have the same effect as fraud, in laying a ground for departing from the written agreement; *Tilton v. Tilton*, 9 New Hampshire, 386, 392; *Philpot v. Elliott*, 4 Maryland Chancery, 83; see *post*, vol. 2, notes to *Woollam v. Hearn*. [Parol evidence may, moreover, be given to apply the contract to its subject-matter, and show what the language used to designate the specific property sold referred to, by showing what was its customary signification in the mouths of the parties, or of others who were acquainted with the locality; *Gerrish v. Towne*, 3 Gray, 82.

The weight of authority would seem to be, that a subsequent oral agreement, to vary a written contract for the sale or transfer of an estate in land, is as much within the provisions of the Statute of Frauds, as if it had been made in the first instance; and consequently cannot be made the ground of a decree in equity, unless it has been so far executed or acted upon, as to come within the principles on which chancery decrees the performance of oral agreements; *Sugden on Vendors*, 146, 151, 9th ed.;

Espy v. Anderson, 2 Harris, 308; *M'Corkle v. Brown*, 9 Smedes & Marshall, 167; *post*, vol. 2, notes to *Woollam v. Hearn*. It has, accordingly, been held, that where the original agreement has been reduced to writing, the complainant cannot introduce proof of subsequent unwritten modifications, unless he can show acts of part performance, referable solely to the charge thus made, and which would not have been done under the original agreement; Sugden on Vendors, 151; *Espy v. Anderson*; *M'Corkle v. Brown*; *Stevens v. Cooper*, 1 Johnson's Chancery, 425, 430; *Price v. Dyer*, 17 Vesey, 356-364. The defendant is, however, in this, as in most other cases, entitled to rebut the complainant's equity, by anything which shows that its exercise would be inequitable; *Workman v. Guthrie*, 5 Casey, 495, 570. He may, therefore, unquestionably prove, that particular parts of the contract have been varied, or that a rescission has taken place of the whole, on the faith of which he has acted; and may in this way prevent a decree for the specific performance of the agreement as it stood at the first instance; *Legal v. Miller*, 2 Vesey, 299; *Boyce v. M'Cullough*, 3 W. & S. 429; *M'Corkle v. Brown*.

But as this course of decision proceeds strictly on the injustice of permitting the complainant to retract a promise or engagement, on the faith of which the defendant has acted, and which cannot be withdrawn without injury to him it is only applicable where some in-

jury would be inflicted by enforcing the contract as originally framed, and will be out of place when the situation of the parties remains unchanged, and nothing has been done on the faith of the proposed alteration; *Price v. Dyer*, 17 Vesey, 356, 364. It has, however, been said, that the defendant may resist a suit for a specific performance, by proving that the contract has been absolutely waived or abandoned, by the plaintiff, without going further, or adducing evidence to show that he has acted upon the waiver, or that he will sustain any injury by its withdrawal; *Botsford v. Burr*, 2 Johnson's Chancery, 576; *Price v. Dyer*; *Boyce v. M'Cullough*; *Raffensberger v. Cullison*, 4 Casey, 427; *Workman v. Guthrie*, 5 Id. 495, 509; *Ryers v. Darby*, 5 C. E. Green, 231. But the truth of this proposition is questioned by Mr. Sugden (Sugden on Vendors, 151, 9th ed.), and would seem doubtful, unless, the lapse of time has barred the right to enforce the contract at law, and weakened the complainant's equity. All that the cases of *Boyce v. M'Cullough*, *Workman v. Guthrie*, and *Raffensberger v. Cullison*, actually establish, is that when a subsequent purchaser buys on the faith of a waiver by the first, the latter will be estopped from contesting a right which he himself has sanctioned. And it would seem, that even if the contract can be annulled while still merely executory, and the right to enforce it specifically defeated by an oral waiver or rescission, this result will

not follow after it has been executed by the payment of the purchase-money, attended or followed by a delivery of possession, which confers an equitable estate on the purchaser, and entitles him to the protection of the Statute of Frauds; *Goucher v. Martin*, 9 Watts, 106, 111.

It would also appear, that the complainant and respondent, in a bill filed for a specific performance, ought to be so far upon the same footing, as to preclude the respondent from setting up any act or default which he has caused or sanctioned as a bar to the equity of the bill. The distinction is plain, between an agreement to vary or abandon the right given by a writing, intended to be mutually binding and insusceptible of being recalled; and a dispensation or waiver, which, although revocable in its own nature, may yet be a good excuse or justification, while it endures; the one being a mere license, and therefore capable of being conferred orally, even when land is in question, the other, an actual variation of the contract, and consequently within the Statute of Frauds; *Pierrepont v. Bernard*, 5 Barbour, 364; 3 Selden, 279; 2 American Lead. Cases, 593, 5th ed. The distinction is a material one and may serve to reconcile the authorities with each other, and with the provisions of the statute; *ante*. See *post*, vol. 2, notes to *Woollam v. Hearn*.

Contracts in consideration of marriage, may, like other contracts within the Statute of Frauds, be taken out of it by a part performance, which renders it inequitable

not to execute the whole; *Neales v. Neales*, 9 Wallace, 1. The law was so held in *Duval v. Getting*, 3 Gill, 138, with reference to an oral gift of land to a daughter, in view of her approaching marriage, followed by possession on her part, and that of her husband; and the same rule was applied by the Court of Appeals, in *Gough v. Crane*, 3 Maryland Chancery, 119; 4 Maryland, 311, overruling the decision of the court below; and an oral agreement between a woman and her intended husband, that he should be entitled to her *choses in action*, absolutely, in consideration of a yearly allowance for pin-money, enforced against the representatives of the wife, after her death, on proof that the husband had taken possession of the bonds at the marriage, and paid the pin-money subsequently; although it may be thought, that a possession to which the husband would have been entitled, aside from the contract, could not serve to evince the existence of the contract.

An agreement for an exchange of lands, followed by an entry into possession, and acts of ownership done on the faith of the agreement, will be specifically enforced; *Reynolds v. Hewitt*, 3 Casey, 176; *Parrill v. M'Kinley*, 9 Grattan, 1; *Johnston v. Johnston*, 6 Watts, 370; *Mills v. Mills*, 8 W. & S. 136; *Beebee v. Dorand*, 22 Barbour, 255; and the better opinion would seem to be, that the entry and possession of one party will take the case out of the statute, as to both, although possession be not actually taken by the other;

Dock v. Hart, 7 W. & S. 172; *Lee v. Lee*, 9 Barr, 169; *Reynolds v. Hewitt*; *Jones v. Pease*, 21 Wisconsin, 644; and, when two parties, claiming land under conflicting and adverse titles, agree to terminate the dispute by dividing the land between them, and each takes possession of the share allotted to him by the agreement, equity will regard the compromise as binding on both, and will not allow it to be defeated, subsequently, by either; *Wend v. Terry*, 2 Douglass (Michigan), 344; *post*, vol. 2, notes to *Stapleton v. Stapleton*. Equity will also enforce the fulfilment of a promise to confer a title by devise, in consideration of a reciprocal devise or present conveyance; *Rivers v. Rivers*, 3 Dessausure, 195; *Johnson v. Hubbell*, 2 Stockton's Ch. 332; when reduced to writing, or sustained by a part performance; although from the nature of such a contract there can seldom be a sufficiently full and specific action under it, during the lifetime of the parties, to warrant the intervention of equity at their death; *Mundorf v. Howard*, 4 Maryland, 459; and it is plain, that an oral promise to devise, unsustained by possession, cannot be enforced by equity; *Steffore v. Bartholomew*, 2 Carter, 153. Indeed, whenever a gift or contract is not to be carried into effect until a future period, as when a father promises to convey or devise land to a son, no act can well amount to a part performance, until the time arrives at which the contract is to be performed; *Hann v. Goodrich*, 33 New Hampshire, 32; *M'Clure v.*

Johnston, 1 Casey, 405; *Eckert v. Eckert*, 3 Penna. 332; *Christy v. Barnhart*, 2 Harris, 260. See *Morgan v. Tollett*, 2 Jones, Eq. 39; where it was said, that a promise to devise, partakes of the ambulatory character, which would belong to the will, if made, and may, consequently, be revoked or recalled at pleasure.]

If the bill shows that the agreement was parol, and no sufficient ground is set forth to take the case out of the statute, the defendant may demur; but if it be stated generally in the bill that such an agreement was made, the court will presume that it was a legal and valid agreement, and the defendant must either plead the fact that it was not in writing, or must allege that fact, and insist upon it as a defence, in his answer. He may deny the contract entirely or in essential particulars, or may require the plaintiff to prove it; and if he does that, and an issue arises as to the substance of the contract, it must be proved by writing, or by parol, supported by part performance; *The Ontario Bank v. Root*, 3 Paige, 478. The defendant may admit the parol agreement, and insist upon the statute in his answer as a bar to any relief thereon; *Barnes v. Teague*, 1 Jones, Equity, 277; *Ash v. Buggy*, 6 Indiana, 259; *Sneed v. Bradley*, 4 Sneed, 301; *Van Dwyne v. Vreeland*, 1 Beasley, 142, 150; unless there has been such part performance as to take the case out of its operation; if he admits the agreement in his answer or by not answering, and does not insist

upon the statute by plea or answer, he is deemed to have waived or renounced the benefit of it; no evidence of the agreement will be necessary, and a decree will be made upon that admission; *Albert v. Ware*, 2 Maryland Chancery, 169; 6 Maryland, 66; *Garner v. Shebblefield*, 5 Texas, 552; *Chetwood v. Brittain*, 1 Green, Chancery, 430; *Dean v. Dean*, 1 Stockton, 425; *Baker v. Hollobough*, 15 Arkansas, 322; *Cozine v. Graham*, 2 Paige, 178, 181; *Harris v. Knickerbocker*, 5 Wendell, 638, 643; *Vaupell v. Woodward*, 2 Sandford's Chancery, 143, 144; *Jervis v. Smith and others*, Hoffman, 470, 476; *Newton v. Swazey et al.*, 8 New Hampshire, 9, 13; *Tilton v. Tilton*, 9 Id. 386, 389; *Houser v. Lamont*, 3 P. F. Smith, 311; *Thornton v. Heirs of Henry*, 2 Scammon, 219, 220; *Esmay v. Grotser*, 18 Illinois, 483; *Tartleton v. Vietes*, 1 Gilman, 470, 473; *Switzer et al. v. Skiles et al.*, 3 Id. 529, 534; *Patterson and others v. Ware*, 10 Alabama, 445, 447; *Woods and others v. Dille and others*, 11 Ohio, 455; *Minus v. Morse and others*, 15 Id. 568, 571; *Allen v. Chambers*, 4 Iredell's Equity, 125, 129; *Hall and Wife v. Hall et al.*, 1 Gill, 383, 386; *Sneed v. Bradley*, 4 Sneed, 301; and it was held in *Sneed v. Bradley*, that the right to rely on the statute as a bar, is peculiar to the parties and those claiming under them as heirs or purchasers, and cannot be taken advantage of by a creditor at large or subsequent judgment creditor.

When the specific execution of

a parol agreement cannot be decreed, in consequence of the uncertainty in its terms, or of the statute being relied on, the court will, if there is no remedy at law, or it is uncertain or embarrassed, or under circumstances of special equity, decree compensation to the extent of the purchase-money paid, and the value of beneficial and lasting improvements; *Phillips v. Thompson*, 1 Johnson's Chancery, 132, 150; *Parkhurst v. Van Cortland*, Ib. 274, 286; *Johnston v. Glancey*, 4 Blackford, 94, 99; *Mialhi v. Lassabe*, 4 Alabama, 713, 714; *Anthony v. Leftwich*, 3 Randolph, 238; *Payne v. Graves*, 5 Leigh, 561; *Rockwell v. Lawrence*, 2 Halsted's Chancery, 190; *Evans v. Battle*, 19 Alabama, 398; *King v. Thompson*, 9 Peters, 218; *Shepherd v. Brown*, 9 Gill, 32, 41; *Sneed v. Bradley*, 4 Sneed, 301. See *Bowie v. Stonestreet*, 6 Maryland, 418, where the rule above stated, was cited and approved by the court, in delivering judgment.

The Statute of Frauds is, in later times, regarded with favor, as a salutary and judicious provision, founded in convenience and sound policy; the prevailing disposition in the courts is to uphold and enforce it; the doctrine of part performance of parol contracts is reluctantly admitted; and the determination is general, not to act upon it further than adjudged cases, or the principles established by them, require. See *Masney v. McIlwain and others*, 2 Hill's Chancery, 421, 426; *Johnston v. Glancy*, 4 Blackford, 94,

99; *Hood et al. v. Bowman et al.*, 1 Freeman, 290, 294; *Anthony v. Leftwich*, 3 Randolph, 238, 244; *Allen's Estate*, 1 Watts & Sergeant, 383, 388; *Frye v. Shepler*, 7 Barr, 91, 93; *Wollam v. Brown*, 2 Stockton's Chancery, 308; *Moore v. Sewell*, 7 Harris, 461; *Poorman v. Kilgore*, 2 Casey, 365; *Cox v. Cox*, Ib. 395. "I agree," said Chancellor Kent, "with those wise and learned judges, who have declared that the courts ought to make a stand against any further encroachment on the statute, and not to go one step beyond the rules and precedents already established;" *Phillips v. Thompson*, 1 Johnston's Chancery, 132, 149. "The beneficial provisions of the

Statute of Frauds, have been sufficiently broken in upon already," said a succeeding Chancellor; "and the doctrine of part performance should not be extended to new cases which do not come clearly within the equitable principles of previous decisions;" *German v. Machin*, 6 Paige, 289, 293.

The doctrine that part performance takes a case out of the operation of the statute, exists only in equity; it has no application to courts of law; *Jackson v. Pierce*, 2 Johnson, 221, 223; *Norton v. Preston*, 15 Maine, 14; *Adams v. Townsend, Administrator*, 1 Metcalf, 483; *Eaton v. Whitaker*, 18 Connecticut, 221, 222; *Barickman v. Kuydendall*, 6 Blackford, 22, 24.

*CUDDEE v. RUTTER.

[*786]

TRIN. TERM, 6 GEO. 1.

REPORTED 5 VIN. AB. 638, PL. 21.¹

SPECIFIC PERFORMANCE OF AGREEMENTS RELATING TO PERSONAL PROPERTY]—*A bill in equity will not tie for specific performance of an agreement to transfer South-sea Stock.*

Bill for a specific performance of an agreement to transfer stock.—The case was, the defendant agreed with the plaintiff to transfer to him 1000*l.* South-sea Stock, upon the 20th of November then next following, at the rate of £104 per cent., and gave him a promissory note under his hand for so doing, and received two guineas of the plaintiff in part of the consideration-money; but the defendant, in drawing the note, had put in the usual words "or pay the difference," which the plaintiff struck out, and would not agree to, and then the defendant signed the note.

After the bargain was made, and before the time of delivering the stock, the South-sea Stock rose considerably in value, and the

¹ *S. C.*, nom. *Cud. v. Rutter*, 1 P. Wms. 570; 2 Eq. Ca. Ab. 18, pl. 8; *Proc. Ch.* 531, cited, nom. *Scould v. Butter*; *Reg. Lib.*, A. 1719, fol. 85; *Reg. Lib.*, B. 1719, fol. 411.

defendant did not deliver the stock at the day, but a few days afterwards offered to pay the difference, and submits so to do by his answer; but the plaintiff insists to have the stock actually transferred to him, and refuses to take the difference, &c.

Sir *Robert Raymond* and *Mr. Vernon*, for the defendant, insisted, that buying of stock in this manner, to be delivered at a future time, at a certain price, was in the nature of a wager upon the rise and fall of stock, and therefore paying the difference is a sufficient performance of the contract; that a contract for the sale of stock differs from *other contracts for sale of an house, lands, &c., for in such things there may be a particular convenience or benefit to the buyer in this individual house, &c.; but it is not so in stock, for one 1000*l.* is as good as another 1000*l.* stock, and is to be purchased daily in Exchange-alley; that the plaintiff has his remedy at law for the damages, viz., the difference, and that is the justice of the case between the parties; that it is discretionary in the Court to decree a specific performance of an agreement, and that in many cases the Court will leave the party to his remedy at law for breach of a contract, &c.

Sir *JOSEPH JEKYLL*, M. R., said that this is a fair and reasonable agreement, and he saw no reason why the Court should not in this case, as well as others, decree a specific performance of the contract, especially since it was insisted upon by the plaintiff, at the making the agreement, that he should not be obliged to take the difference, but would have the stock actually delivered to him; and it is more for the advantage of the buyer to have the stock than the difference, and saves him the trouble of buying it of another, and paying brokerage; and decreed that the defendant do transfer the stock, and pay the dividends since the 20th of November, plaintiff to pay interest of the money to that time, and ordered costs to the plaintiff.

On an appeal from this decree, Lord Chancellor Parker,¹ upon opening the cause, asked if the plaintiff was at the South-sea House upon the day appointed for transferring the stock, to demand it, and tender the money, and seemed strongly against the plaintiff, and urged the law in case of a bargain for corn to be delivered upon a day certain at such a market, at such a price, and the corn is not delivered according to the contract; the buyer shall not by a bill in equity compel the buyer to a specific performance of this agreement, but the seller is left to his remedy at law, for breach of the agreement to recover damages, id est, the difference between the price agreed on by the parties, and the price of corn upon the market-day.

*It was said, it was the common justice of this Court
[*788] to compel the party to a specific performance of his agree-

¹ Afterwards Earl of Macclesfield.

ment, if the same was just and reasonable, and fairly obtained: that this was a just, reasonable, and fair agreement in all the circumstances: it was the current price of the stock at that time, and no imposition upon the defendant: that the subsequent rise could not alter the case, for it was an equal hazard that it might fall, and the parties in such contracts executory must take their chance. They compared it to the case of a contract for so many bales of silk, or any other merchandise, to be delivered at a future day, at a certain price: if the value of the silk, or other goods, doth rise before the day, that is no excuse for non-performance of the contract. So, in the case of a contract for lands, if lands rise in value, yet the party ought to execute his agreement. They said, that, from the time of the contract to the time appointed for the delivery, the stock did not rise above 12l. per cent.; that it was not more at the time of filing the bill, which was in January, 1718; nay, it was not more at the time of the decree pronounced by the Master of the Rolls in Michaelmas Term last: and though the stock has risen since to a vast price, between 900l. and 1000l. per cent., if the plaintiff¹ suffers by that it is his own fault, in not performing his contract sooner, when he was demanded so to do, and in not obeying the decree, as he ought to have done: that whatever has happened since cannot alter the case: that the contract was reasonable at the time it was made, and so it was when the bill was filed and the decree pronounced.

It was said for the defendant, that the rule was laid down too general for compelling the execution of agreements between the parties: that this Court would not compel the party to perform a hard agreement, though it was fair at the time it was made, but leave the other party to his remedy at law: that it was very unreasonable now to compel the defendant to transfer 1000l. South-sea Stock to the plaintiff, at 104l. 10s. per cent., when it was worth 1000l. per cent.; that paying the difference *at the day was a good performance of this contract: that the plaintiff knew that the defendant had no stock when he made the bargain with him, and therefore could not expect to have the stock delivered to him, but to have the difference if the stock should happen to rise before the time; and he had no more intention to take the stock than the other had to deliver it, and this appears by his non-attendance at the South-sea House upon the day to accept and pay for the stock. They cited the case of *The Marquess of Normandy v. Lord Berkly*, temp. Lord Somers, C., who said, in that case, that the Court would not carry agreements into execution unless the contract was reasonable and fair in every particular, because they cannot mitigate damages upon the circumstances of the case, as a jury may do, but must decree the whole contract to be performed.

It was replied that the plaintiff, some days before the stock was to be delivered, told the defendant that he expected to have the

¹ Qu defendant.

stock delivered to him; but the defendant said that he had not the stock, and therefore could not deliver it; and afterwards the defendant kept out of the way for some days, and the plaintiff could not find him, and that was the reason he did not attend at the South-sea House to accept the stock; that, this being occasioned by the defendant's own unfair dealing, the plaintiff ought not to suffer by it; and upon that account the plaintiff ought to be relieved in equity, because he is remediless at law for want of a legal demand and tender upon the day.

LORD CHANCELLOR PARKER.—There is no reason to bring this bill for a specific performance of this agreement, because there is no difference between this 1000*l.* South-sea Stock and another 1000*l.* stock, which the plaintiff might have bought of any other person upon the very day; and the plaintiff doth not suffer at all by the non performance of the agreement specifically, if the defendant pays him the difference.

These sorts of contracts are commonly understood to mean [*790] *no more than to transfer the stock or pay the difference, and this fully answers the intention of the parties; and the party has thereby the entire benefit of his contract as fully as if the stock were actually delivered, for he may buy of any other person, and be no more money out of pocket than if the stock were delivered to him according to the agreement. This differs very much from the case of a contract for lands, some lands being more valuable than others—at least, more convenient than others—to the purchaser; but there is no difference in stock—one man's stock is of equal benefit and conveniency as another's.

Secondly, it appears that the defendant had not the stock when the contract was made, and this Court will not decree a specific performance of a contract when the party has not the thing to deliver. Suppose a contract for the sale of land, and the party has not the land at the time he contracted for the sale of it, this Court would not decree a specific performance of the agreement. If there be a contract for the sale of malt, or any other commodity, and the seller has not the malt or other things agreed to be delivered, this Court would not compel the party to perform his agreement, but leave the buyer to recover his damages at law for non-performance of the agreement.

Thirdly, in contracts for stock, being subject to sudden rise and fall, the day is the most material part of the contract, and therefore not proper for a court of equity to carry into execution. The decree might be beneficial to the plaintiff one day, and to his prejudice the next. I shall always discourage bills of this kind; but since the defendant did shuffle with the plaintiff, and not offer to pay him the difference till two months after the day, I will not dismiss the bill, but let the Master inquire what the difference was at the day, and the defendant pay it to the plaintiff, with interest, but no costs.

*It is proposed in this note to consider the question much discussed in the principal case, viz., of what contracts courts of equity will decree the specific performance. This may be considered most conveniently under three general heads:—1st. When the contract relates to property, whether real or personal; 2nd. When the contract relates to personal acts; and 3rd. The extension of the jurisdiction of equity in matters of specific performance by the legislature conferring powers to award damages in certain cases. It must, however, be first observed, that a court of equity will not decree specific performance of a contract unless it be founded upon valuable consideration: *Cochrane v. Willis*, 34 Beav. 359. [*791]

1st. *As to contracts relating to real and personal property.*—Where a contract in writing respecting real property, in conformity with the Statute of Frauds, is entered into between competent parties, and is, moreover, in its nature and circumstances, unobjectionable, it is as much of course for a court of equity to decree a specific performance, as it is for a court of common law to give damages for the breach of such a contract: *Hall v. Warren*, 9 Ves. 608. The original and sole foundation of the jurisdiction to decree the specific performance of contracts is simply this—that an award of damages at law will not give a party the compensation to which he is entitled; that is, will not put him in a situation as beneficial to him as if the agreement were specifically performed: *Harnett v. Yeilding*, 2 S. & L. 553.

As to the jurisdiction to enforce the specific performance of contracts relating to lands out of the jurisdiction of the Court, see *Penn v. Lord Baltimore*, vol. ii. post.

The decision in the principal case shows that specific performance of agreements relating to personalty will not, as in the case of agreements relating to realty, be invariably decreed: it will, however, be seen, upon examining the authorities, that whenever courts of equity refuse to interfere with agreements relating to personalty, they do so, not because of any difference between real and personal property, but because damages at law will be an adequate compensation; and there is, therefore, no reason why the jurisdiction of equity should be called into action. Upon this ground chiefly the Lord Chancellor, in the principal case, refused to decree the specific performance of the agreement, observing, that it differed much from “a contract for lands, some lands being more valuable than others—at least, more convenient than others—to the purchaser; but there is no difference in stock—one man’s stock is of equal benefit and conveniency as another’s.” So, likewise, in *Adderley v. Dixon*, 1 S. & S. 610, Sir *John Leach, V. C., observes—“Courts of equity decree the specific performance of [*792] contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus, a court of equity decrees performance of a contract

for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So, a court of equity will not, generally, decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for; inasmuch as with the damages he may purchase the same quantity of the like stock or goods." In *Buxton v. Lister*, 3 Atk. 384, Lord Hardwicke, C., lays down the same distinction between contracts relating to chattels and contracts relating to lands; but he does not give the same reasons for the distinction. "In general," he says, "this Court will not entertain a bill for a specific performance of contracts of stock, corn, hops, &c.; for, as those are contracts which relate to merchandise, that vary according to the different times and circumstances, if a court of equity should admit such bills, it might drive on parties to the execution of a contract, to the ruin of one side, when upon an action that party might not have paid, perhaps, above a shilling damage. . . . As to the cases of contracts for the purchase of lands or things that relate to realties, those are of a permanent nature; and, if a person agrees to purchase them, it is on a particular liking to the land, and is quite a different thing from matters in the way of trade. The reasons, however, given by Lord Hardwicke for a court of equity not entertaining jurisdiction in cases of chattels, as is well observed by Chief Baron Richards, would equally apply to contracts for the purchase of land, which falls and rises in value in an extraordinary manner. See *Wright v. Bell*, 5 Price, 329. The reasons given by Sir John Leach are the best.

The question, therefore, in all cases where the specific performance of an agreement relative to personalty is sought, is this—will damages at law afford an adequate compensation for breach of the agreement? If it will, there is no occasion for the interference of equity; the remedy at law is complete: if it will not, specific performance of the agreement, as in the case of an agreement relating to realty, will be enforced.

In *Cappur v. Harris*, Bumb. 135, *Mr. Baron Gilbert laid [*193] down, as a general rule, that a court of equity will not aid a person coming to have a contract for South-sea Stock carried into execution, but will leave him to such remedy as he could have at law. See, also, *Nutbrown v. Thornton*, 10 Ves. 161, where Lord Eldon observes, "It is now perfectly settled that this Court will not enforce the specific performance of an agreement for a transfer of stock; but in a book I have of Mr. Brown's I see Lord Hardwicke did that." So, in *Buxton v. Lister*, 3 Atk. 384, Lord Hardwicke says, "In general, this Court

will not entertain a bill for a specific performance of contracts of stock, corn, hops, &c."

In the following cases, however, it has been held, that, as damages at law could not be correctly estimated, or would not furnish a complete and adequate remedy for the non-performance of a contract relative to personal property, equity ought to decree specific performance. In *Taylor v. Neville*, cited in *Buxton v. Lister*, 3 Atk. 384, specific performance was decreed of a contract for sale of 800 tons of iron, to be delivered and paid for in a certain number of years, and by instalments; and the reason given by Lord Hardwicke is, "that such sort of contracts differ from those that are immediately to be executed;" and they do differ in this respect, that, the profit upon the contract being to depend upon future events, cannot be correctly estimated in damages, where the calculation must proceed upon conjecture. In such a case, to compel a party to accept damages for the non-performance of his contract, is to compel him to sell the actual profit which may arise from it at a conjectural price. In *Ball v. Coggs*, 1 Bro. P. C. 140, Toml. ed., specific performance was decreed, in the House of Lords of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundred weight of brass wire manufactured by the defendant during the life of the plaintiff; for damages might be no complete remedy, being to be calculated merely by conjecture: and to compel the plaintiff, in such a case to take damages, would be to compel him to sell the annual provision during his life, for which he had contracted, at a conjectural price. In *Buxton v. Lister*, 3 Atk. 385, Lord Hardwicke puts the case of a ship-carpenter purchasing timber which was peculiarly convenient to him by reason of its vicinity, and also the case of an owner of land covered with timber contracting to sell his timber in order to clear his land; and assumes that, as in both those cases damages would not, by reason of the special circumstances, be a complete remedy, equity would decree specific performance—Per Sir J. Leach, V. C., 1 S. & S. 610. In *Thorn v. The *Commissioners of Public Works*, 32 Beav. 490, Lord Romilly, [*794] M. R., decreed specific performance of a contract to purchase the arch stone, spandril stone, and the Bramley Fall stone contained in the old Westminster Bridge. See also *Pollard v. Clayton*, 1 K. & J. 462; and the comments therein of Sir W. Page Wood, V. C., on *Taylor v. Neville*, and *Buxton v. Lister*, *Ib.* p. 474.

So a contract for the purchase of articles of unusual beauty, rarity, and distinction, such as objects of vertu, will be enforced, as damages would not be an adequate compensation for non-performance—per Kindersley, V. C., in *Falcke v. Gray*, 4 Drew, 658.

Upon the ground that the remedy ought to be mutual, a court of equity will, upon a bill filed by a vendor, enforce specific performance of a contract to purchase debts, although he seeks only for payment of

the purchase-money. Thus in *Adderley v. Dixon*, 1 S. & S. 607, the plaintiffs, having purchased and taken assignments of certain debts which had been proved under two commissions of bankruptcy, agreed to sell them to the defendant for 2s. 6d. in the pound. Sir John Leach, V. C., compelled a specific performance of the agreement at the suit of the vendor. "The present case," observed his Honor, "being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts, it appears to me, that, upon the principle established by the cases of *Ball v. Coggs*, and *Taylor v. Neville*, a court of equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and to compel this purchaser to take such damages would be to compel him to sell those dividends at a conjectural price. It is true, that the present bill is not filed by the purchaser, but by the vendor, who seeks, not the uncertain dividends, but the certain sum to be paid for them. It has, however, been settled by repeated decisions, that the remedy in equity must be mutual, and that where a bill will lie for the purchaser, it will also lie for the vendor." So, in *Wright v. Bell*, 5 Price, 325; Dan. Ex. Rep. 95, a specific performance of a contract to purchase a debt was enforced.

In *Withy v. Cottle*, 1 S. & S. 174, a demurrer to a bill filed by the vendor for the specific performance of an agreement for the purchase of an annuity payable out of the dividends of stock standing in the name of the Accountant-General of the Court of Chancery, was overruled by Sir John Leach, V. C. "There can be no doubt," observed his Honor, "that the defendant, who is the purchaser of this annuity, might have filed a bill for the specific performance of the agreement for [*795] sale to him, because *a court of law could not give him the subject of his contract, and the remedy here must be mutual for purchaser and vendor:" and see *Clifford v. Turrell*, 1 Y. & C. C. C. 138; 9 Jur. 633.

And a court of equity will, on behalf of a vendor of life annuities, enforce specific performance of the contract, by compelling payment of the purchase-money, even after the death of the annuitant: at any rate, where there are arrears of the annuity due, sufficient to support a bill filed by the annuitant. It is true that a court of equity entertains a suit for specific performance by a *purchaser* in order to give him the very subject of his contract; nevertheless, although the demand of the vendor be merely for a sum of money, it will entertain a similar suit for him, upon the principle that the remedies ought to be mutual. *Kennedy v. Wexham*, 6 Mad. 355, 357.

And where there is a valid contract for the sale of a patent, the Court will specifically enforce it, in a suit by a purchaser against the vendor, and will make the latter execute an assignment. The opposite

also is equally true, that the vendor may come into equity for the purchase-money: *Cogent v. Gibson*, 33 Beav. 557.

In contracts relating to commodities fluctuating from day to day in market price, the Court expects persons to be unusually vigilant and active in asserting their right to specific performance, which it is inequitable to grant after a delay on the part of the plaintiff, and when the parties may be no longer in the same position. *Pollard v. Clayton*, 1 K. & J. 462.

And a court of equity will not only entertain suit for specific performances of contracts by vendors in ordinary cases where the price is named, but also where land has been taken by a railway company, and the price ascertained by a jury. See *Doherty v. Waterford and Limerick Railway Company*, 13 Ir. Eq. Rep. 538. "A legal remedy," said Lord Chancellor Brady, "exists to recover the money; but it is a fallacy to say that, because the plaintiff insists upon the specific performance of the contract—and that is the decree the Court is called on to make—the parties should go to law—There must exist mutuality; the company could file a bill to compel the transfer, and the plaintiff accordingly has the right to insist upon this specific performance of the contract."

And where a railway company, has given notice to treat for land to the landowner, and the price of the land has been fixed by arbitrators under the Lands' Clauses Consolidation Act, the railway company is in the same position with regard to the landowner as an ordinary purchaser, and will be compelled by a court of equity to complete the purchase (*Harvey v. Metropolitan Railway Company*, 7 L. R. [796] Ch. App. 154); and where a railway company, after giving notice to treat, has paid the purchase-money for leaseholds, and has, with the consent of the lessee, been admitted into possession, it will, at the suit of the lessee within a reasonable time, be compelled to accept an assignment containing the usual covenants: *Ib.* See, also, *Harding v. The Metropolitan Railway Company*, 20 W. R. (L. C.) 321.

But although courts of equity, as we have seen, will not ordinarily decree specific performance of contracts to purchase chattels, if damages at law will be an adequate compensation; nevertheless, if a trust be created, the circumstance that the subject matter to which the trust is attached is a personal chattel, will not prevent the Court from enforcing the due execution of that trust, not only against the trustees themselves, but against all persons who obtain possession of the property affected by the trust, provided they had notice of the trust. *Pooley v. Budd*, 14 Beav. 34, 43, 44, per Sir J. Romilly, M. R. "For instance, if a man about to contract marriage, and possessed of a large and valuable quantity of iron, lead, or copper ore, assigned that ore to the trustees of the settlement, in trust to sell and invest the proceeds, and hold the proceeds when invested, upon the trusts of the settlement,

there can be no question but that this Court would, before the sale, compel the possessor of the ore and the trustees of the settlement to fulfil every part of the trust, which one had undertaken to constitute, and the other had undertaken to execute." *Ib.* p. 43.

So where a person had by agreement declared himself to be the trustee of stock for another person, with whose money it had been purchased, it was held, that the doctrine acted upon in the principal case was not applicable, and a transfer was compelled to the person beneficially entitled. *Staunton v. Percival*, 5 H. L. Cas. 257, 268.

In the case of *Doloret v. Rothschild*, 1 S. & S. 590, it was held by Sir John Leach, V. C., that a bill would lie for the specific performance of a contract for the purchase of Neapolitan stock, where it prayed for the delivery of the certificates which would constitute the plaintiff proprietor of a certain quantity of stock; "because," said his Honor, "a court of law could not give the property, but could only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party. I consider also, that the plaintiff, not being the original holder of the scrip, but merely the bearer, may not be able to maintain any action at law upon the contract, and that if he has any title, it must be in equity." In *Duncuft v. Albrecht*, 12 [797] Sim. 189, specific performance of a *parol agreement for the sale of some railway shares was decreed by Sir L. Shadwell, V. C. "The only question," observed his Honor, "is, whether there has been any decision from whence you can extract a conclusion that the Court will not decree a specific performance of an agreement for the sale of such shares. Now, I agree that it has been long since decided, that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But, in my opinion, there is not any sort of analogy between a quantity of 3l. per Cents., or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market." This decision was, on the 23rd of July, 1841, affirmed by the Lord Chancellor. And see *Shaw v. Fisher*, 2 De G. & Sm. 11; *Wilson v. Keating*, 7 W. R. (M. R.) 484.

And specific performance has been decreed of a contract for the sale of shares in a joint stock company, although there was a provision in the deed of settlement "that no shareholder should be at liberty to transfer his shares except in such manner as a board of directors should approve." See *Poole v. Middleton*, 29 Beav. 646, where the Master of the Rolls said that he did not say whether the plaintiff would become a shareholder unless the board of directors approved of the manner in which the transfer was made. That the mode of transfer must be approved by the board, who could not exercise an arbitrary and unrea-

sonable will on such an occasion, or reject the mode of the transfer, in that instance, which they approved and allowed in other cases.

But the Court will not ordinarily compel specific performance of a contract to sell shares, where the assent of the directors is necessary in order that the purchaser's name be placed upon the register, and they refuse to give it (*Birmingham v. Sheridan*, 33 Beav. 660), but if the directors wantonly or for some idle and foolish reason refused to admit a purchaser, the Court might compel them to do so, and compel specific performance of the contract: *Ib.* 665, and see *Robinson v. The Chartered Bank*, 1 Law Rep. Eq. 32. Again, a contract of this nature might exist:—A purchaser might say to a vendor, "I will buy your 1000 shares in this company; if the directors do not choose to assent to my being put on the list of shareholders, we cannot compel them to do so; nevertheless, as between ourselves, there shall be this contract:—we will act exactly as if the shares *had been sold to me, and I [*798] had been accepted as a shareholder. You shall pay me all the future dividends, and I will pay every future call, and indemnify you from every liability," per Sir John Romilly, M. R. (*Ib.*) 665.

An agreement to accept a transfer of railway shares on which nothing has been paid, may be enforced as an agreement for valuable consideration, in consequence of the liabilities to which the purchaser is subjected, and from which the vendor is relieved upon the transfer: *Cheale v. Kenward*, 3 De G. & Jo. 27.

And where specific performance has been decreed of a contract to purchase railway shares, the Court will order the purchaser to pay the calls that have been made since the sale, to indemnify the vendor against all future calls in respect of the shares, and to take proper measures to procure himself to be registered: *Wynne v. Price*, 3 De G. & Sm. 310; *Shaw v. Fisher*, 5 De G. M. & G. 596.

Where, however, a person previous to the passing of the Act of Parliament authorising a proposed railway, purchased some "scrip certificates," and upon payment of the purchase-money, received and returned the certificates, though no particular contract was entered into upon the occasion, it was held by Lord Langdale, M. R., that after the Act had passed, the purchaser was not bound to take a transfer of the corresponding shares from the vendor, or to indemnify him from the amount of calls subsequently made. "This," said his Lordship, "is called a purchase of shares, when it is a purchase of mere certificates, and the question is, whether there is a contract on the part of the defendant to become a proprietor at all events? I cannot find it expressed, and I cannot raise it by implication of law. There is not, in my opinion, any evidence of such an agreement as the plaintiff seeks to have specifically performed: and the bill must therefore be dismissed with costs;" *Jackson v. Cocker*, 4 Beav. 66.

An agreement to accept shares in a joint stock company by a de-

fendant who fills up and signs a form to that effect, will be specifically performed against him in equity (*The New Brunswick and Canada Railway and Land Company (Limited) v. Muggeridge*, 4 Drew. 686), but to entitle the directors to relief, their proceedings must be prompt, *The Oriental Inland Steam Company (Limited) v. Briggs*, 2 J. & H. 625), and it seems that specific performance will not be decreed to take shares where the partnership might be immediately put an end to: *The Sheffield Gas Consumer's Company (Registered) v. Harrison*, 17 Beav. 294, but see the observations on this case in *The New Brunswick and Canada Railway and Land Company (Limited) v. Muggeridge*, 4 Drew. 686.

[*799] *The discretion of directors to forfeit shares for non-payment of calls is a trust to be exercised for the benefit of all the shareholders; an agreement, therefore, on the part of directors with a shareholder to relieve him from further liability on his consenting to an absolute forfeiture, will not be enforced if it appears not to have been a proper exercise of the discretion on the part of the directors: *Harris v. The North Devon Railway Company*, 20 Beav. 384.

It is no objection to specific performance, that a call may have been made by the company upon shareholders, of which call the purchaser had no notice, at any rate where there was no deception practised by the vendor: *Hawkins v. Maltby*, 3 L. R. Ch. App. 188, 4 L. R. Ch. App. 202.

Where, however, a person has agreed to purchase shares, or even if he has paid the purchase-money and executed the transfer, if he did so in ignorance that a petition for winding up the company had been presented, a court of equity would not decree specific performance of the contract, or render him liable as a contributory by directing his name to be put upon the register: *Emmerson's Case*, 1 L. R. Ch. App. 433.

So, where it is impossible that a purchaser's name can be put upon the register, the contract cannot be carried into execution, because part of the contract is, that the name of the purchaser should be put upon the register, and that part cannot be performed. See *Birmingham v. Sheridan*, 33 Beav. 660.

It may be here mentioned, that all contracts after the 1st of July, 1867, for the sale of shares and stock in joint stock banking companies are void, unless the numbers by which such shares are distinguished are set forth in such contracts, 30 & 31 Vic. c. 29, s. 1. An error in the distinguishing number of shares in a transfer is immaterial, as it may be afterwards rectified: *In re International Contract Company, Ind's Case*, 7 L. R. Ch. App. 485.

Much discussion has of late taken place with reference to the liability of stock-jobbers, or buyers from them, towards the vendors of shares.

It is now, however, finally settled, after some conflict of decisions,

that the contract of a jobber who purchases shares is, that at the settling-day he will either take the shares himself, in which case he would be bound to accept and register a transfer and to indemnify the vendor, or that he will give him the names of one or more transferees—names to which no reasonable objection can be made,—who will accept and pay for the shares: *Coles v. Bristowe*, 4 L. R. Ch. App. 11, per Lord Cairns, L. C.

Not only will the jobber be liable where he has not furnished the names of proper transferees who accept the shares, but also, where other terms are added to the original contract, which he does not fulfil, by a complete novation, or a substitution of *another contract for the original contract, his liability as principal will remain. [*800] See *Cruse v. Paine*, 4 L. R. Ch. App. 441. There the plaintiff, through his brokers, agreed to sell to the defendants, who were stock-jobbers, 100 shares in a company. The sale note was in the usual form, with the addition of the words "with registration guaranteed." The defendants before the day sent to the plaintiff's brokers the name of a transferee who duly paid the purchase-money. The seller executed the deed of transfer, and delivered it to the transferee. The transferee never registered the transfer, and calls were made upon the seller. Upon a bill being filed against the stock-jobbers, for specific performance and indemnity, it was held by the Lord Chancellor (Lord Hatherley), affirming the decision of Sir G. M. Giffard, V. C. (6 L. R. Eq. 641), that the plaintiff was entitled to a decree, inasmuch as there was no novation or substitution of another contract for the original contract. See also *Maxted v. Paine*, 4 L. R. Ex. 203; *Grissell v. Bristowe*, 4 L. R. C. P. 36; reversing *S. C.* 3 L. R. C. P. 112; *Davis v. Haycock*, 4 L. R. Ex. 373.

Where, however, the jobber, instead of taking the shares himself, elects to perform the other alternative, and sends in names which are accepted, and to which transfers are taken and paid for by the transferees or their brokers; the jobber is then and at that stage relieved from further liability, and the liability to register and indemnify is shifted to the transferees. See *Coles v. Bristowe*, 4 L. R. Ch. App. 3; there the plaintiff, a holder of 200 shares in a company, by his brokers contracted on the Stock Exchange for the sale of that number of shares to the defendants, who were jobbers, for a future day called settling-day. Before the settling-day, the jobbers on the day called the name-day, in accordance with custom of the Stock Exchange, gave to the vendor's broker the names of seventeen persons as ultimate purchasers, to whom the shares were to be transferred in different parcels. The brokers of the vendor accordingly prepared seventeen deeds of transfer, got them executed by the vendor, and on settling-day handed them and the share certificates to the jobbers, who thereupon paid the price agreed upon. In the meantime, the company had stopped pay-

ment, and was ordered to be wound up. The seventeen transferees, through their brokers, had paid their purchase-money to the jobbers, and had received but not executed the deeds of transfer, and the plaintiff, whose name remained on the list of shareholders, was obliged to pay calls on these shares. The plaintiff thereupon filed a bill against the jobbers, claiming indemnity against the calls. It was held by the

Court *of Appeal in Chancery reversing the decision of Sir R. [*801] Malins, V. C. (reported 6 L. R. Eq. 149), that the contract between the plaintiff and the jobbers must be interpreted according to the rules of the Stock Exchange, and that after the jobbers had paid to the vendor his purchase-money, and given the names of transferees to whom the vendor executed transfers, and after these transferees through their brokers had received the transfers and paid their purchase-money to the brokers, the liability of the jobbers had ceased, and that the bill ought to be dismissed. See also *Bowring v. Shepherd*, 6 L. R. Q. B. 309.

When the name of an infant is given by the jobber as a purchaser, the jobber, even although he is ignorant of the fact of the infancy, and a transfer has been executed to the infant, will be compelled to indemnify the vendor (*Merry v. Nickalls*, 20 W. R. (L. J.) 929; 27 L. T. Rep. (N. S.) 12; where the Lords Justices reversed the decision of Sir J. Bacon, V. C., reported 20 W. R. 531, 26 L. T. Rep. (N. S.) 496, and overruled the decision of Lord Romilly, M. R., in *Rennie v. Morris*, 13 L. R. Eq. 203); but the actual purchaser, who forwards the name of an infant to the jobber, will be compelled to indemnify the jobber: *Peppercorne v. Clinch*, 26 L. T. Rep. (N. S.) 656.

Where after a contract by a vendor of shares on the Stock Exchange with a jobber, or intermediate person, a transfer has been executed by the vendor, and accepted and paid for by a third person, the vendor may file a bill against such third person, and oblige him to register and indemnify him from calls. Thus, in *Paine v. Hutchinson*, 3 L. R. Ch. App. 388, the plaintiffs, who were stock-jobbers, in November, 1865, bought shares in a company from one Cruse, which they shortly afterwards sold to Price and Potts, brokers, who on the settling day, gave the name of the defendant as transferee. The plaintiffs, thereupon, on the 17th of November, delivered to Price and Potts transfers of the shares from Cruse to the defendant only executed by Cruse. The defendant paid the purchase-money, but did not get the shares registered, and refused to do so, alleging that he had bought the shares on another person's account, and never intended to have them registered in his own name, nor authorised giving his name as a transferee, and that the shares had been sold without any special guarantee that the transfers should be executed by the purchaser—the defendant. In January, 1866, the plaintiffs filed their bill. On the 23rd April, 1866, an order was made for winding up the company. It was held by the

Court of Appeal in Chancery, affirming with slight variations the decree of Sir J. Stuart, V. C. (reported 3 L. R. Eq. 257), that the plaintiffs were entitled to a decree for specific performance, and that the *defendant ought to concur in the necessary steps for duly registering the shares in his name, and also to indemnify the [*802] plaintiffs: *Hodgkinson v. Kelly*, 6 L. R. Eq. 496; *Hawkins v. Maltby*, 6 L. R. Eq. 505; 4 L. R. Ch. App. 200; *Sheppard v. Murphy*, 1 I. R. Eq. 490; 2 I. R. Eq. 544.

Specific performance and indemnity will be decreed against the purchaser, although by accident, he only sent the transfers for registration after the company had stopped payment: *Evans v. Wood*, 5 L. R. Eq. 9. And in the absence of evidence that the transferee was objectionable, it would be presumed that directors, though having a discretionary power to refuse, would have registered the transfer, *Ib.*, for the directors could not have refused to register it without a reason: *Poole v. Middleton*, 29 Beav. 646.

And where the actual purchaser of shares, or his broker, gives the name of a third party, as purchaser to whom the transfers are made out, if such third party by his conduct induces the vendor to believe that he has adopted the contract, he will be compelled specifically to perform it. See *Shepherd v. Gillespie*, 5 L. R. Eq. 293; there a broker, on the instructions of Wilkinson, purchased from the plaintiff shares in a Company subsequently wound up, and on the settling day the broker, also on the instructions of Wilkinson, gave the name of Gillespie as the purchaser, and the deeds of transfer were made out in Gillespie's name and delivered to him for execution, and he for some time, retained possession of and dealt with them. Wilkinson informed Gillespie, that he had passed his name as transferee, and had also passed a cheque on the company's bankers for the purchase-money to the debit of his firm. Gillespie took no step to inform the vendor that he did not assent to the contract, though he did express his dissent to Wilkinson. It was held by Sir John Stuart, V. C., that the vendor was entitled to specific performance of the contract against Gillespie, and to have the shares registered in Gillespie's name, and to be repaid by Gillespie all calls which he had already paid, and to be indemnified against future calls, and against all liability, loss, costs, damages, and expenses, which he had incurred or might thereafter incur, by reason of being settled on the list of contributors, in respect of such shares. See Form of Decree, 5 L. R. Eq. 298, 299, 300.

It has been decided that a Court of equity will neither decree specific performance of a contract to lend (*Sichel v. Mosenthal*, 30 Beav. 271; *Brough v. Oddy*, 1 Russ. & My. 55; *Flight v. Bolland*, 4 Russ. 298, 301; *Thorpe v. Hosford*, 20 W. R. (V. C. B.) 922; but see *Bass v. Clively*, Tam. 80), nor of a contract to borrow (*Rogers v. Challis*, 27 Beav. 175) or to pay (*Crampton v. The Varna Railway Company*,

7 L. R. Ch. App. 562; 20 W. R. L. C. 713) money; but it seems the [*803] Court will decree specific performance of an *agreement to execute a mortgage in consideration of money due: *Ashton v. Corrigan*, 13 L. R. Eq. 76.

The specific performance of contracts for the purchase of chattels, may, clearly, be resisted upon the same grounds as the specific performance of other contracts. Thus, in a recent case, where the plaintiff had, without actual fraud, contracted for the purchase of two very valuable jars, the parties not being upon an equal footing, since the plaintiff well knew, and the vendor (who was an elderly lady) was ignorant of their value, and sold them at an inadequate price, Sir R. T. Kindersley, V. C., dismissed the bill seeking specific performance of the contract: *Falcke v. Gray*, 4 Drew. 651.

In the principal case, the Lord Chancellor lays it down as a general rule, "That the Court will not decree a specific performance of a contract when the party has not the thing to deliver." This was acted upon in a modern case, a bill having been filed against the provisional committee of a projected railway company for specific performance of an agreement to deliver to the plaintiff a certain number of scrip certificates; as there was no allegation in the bill that the defendants had in their possession any scrip to deliver, but statements from which the contrary might rather be inferred, Lord Cottenham, C., allowed a demurrer to the bill. *Columbine v. Chichester*, 2 Ph. 27. See *Pollard v. Clayton*, 1 K. & J. 475.

There is an exception to the ordinary rule of specific performance, when British ships, or shares in them, form the subject matter of the contract; for it is clear that a Court of equity will not enforce a contract for the purchase, either of a British ship, or shares in a British ship; inasmuch as, according to the policy of this country, both under the old Ship Registry Acts (*Brewster v. Clarke*, 2 Mer. 75; *Thompson v. Leake*, 1 Madd. 39; *Newnham v. Graves*, Ib. 399, n.; *Battersby v. Smyth*, 3 Madd. 110), and under the Act lately in force (8 & 9 Vict. c. 89, ss. 34, 37; *Hughes v. Morris*, 2 De G. M. & G. 349, 357), there could be no transfer of a ship in equity that is not a transfer at law.

The law is the same under the Act (17 & 18 Vict. c. 104), notwithstanding the omission there of the clause in the previous Act, that if the statutory mode of transfer be not followed, "the transfer shall not be valid or effectual for any purpose whatever at law or in equity." The *Liverpool Borough Bank v. Turner*, 2 De G. F. & Jo. 502, affirming the decision of Sir W. P. Wood, V. C., 1 J. & H. 159; *M'Larty v. Middleton*, 9 W. R. (V. C. K.) 861. But see the 25 & 26 Vict. c. 63, s. 3, since which it has been decided that where there has been a complete transfer of a ship, there is nothing *in the Act 17 & 18 Vict. c. [*804] 104, which prevents the transferor from shewing the real intention of the parties, viz.: that this instrument should operate as a secur-

ity only for the money advanced, the absolute interest remaining in the transferor only: *Ward v. Beck*, 9 Jur. N. S. 912, 13 C. B. N. S. 668; and see *Stapleton v. Haymen*, 12 W. R. (Exch.) 317.

And the provisions of the Ship Registry Acts were held to apply equally to contracts and to sales, and the whole frame of these acts negative any equity resulting out of the doctrine of notice. Thus, in *M'Calmont v. Rankin*, 2 De G. Mac. & G. 403, it was held by Lord St Leonards, C., that an unregistered agreement as to the sale of the ship, entered into with the plaintiffs by the registered owner of the ship; who subsequently transferred it for value to another person having notice of the agreement, could not be enforced, either as against the ship or its proceeds. "It was contended before me," said his Lordship, "as it was in the case of *Hughes v. Morris* (2 De G. Mac. & G. 349), that the contract to transfer, as in ordinary cases in this Court, is equivalent to an actual transfer of the property, but the moment such a proposition is enunciated, it is obnoxious to the rule provided by the Ship Registry Acts, which destroys its effect both at law and in equity. I think, therefore, I am entirely precluded from giving any relief as regards the transfer of the ship itself.

"Then it has been most elaborately argued, that I might and ought to give effect to the transaction as regards the proceeds of the vessel, although I cannot affect the vessel itself. I do not lay down any rule that parties cannot authorise a ship to be sold, and decree in what manner the money shall be applied. That is quite a different question. But the question before me is this: the plaintiffs claim the right under certain documents, which, they say, vest the property of the vessel in them, but for the Ship Registry Acts: and being forced to relinquish such right to the vessel, they say they have an equity to that which represents the vessel, namely, the price produced by the sale of the vessel, and that a court of equity is bound to give effect to that claim. Can this Court give any relief as regards the proceeds of property which could not be given as against the property itself? There may be cases put, with regard to other transactions, in which the Court would follow the money, and would not follow the property, but I think the right to the money here must spring out of the right to the vessel. The right, if there was any right created, was to the vessel, for the consignment was of the vessel, and the vessel, by its proceeds, no doubt, was to pay its *debts; but before effect was given to that inchoate right, before it ever [*805] ripened into a perfect contract,—and while it was pending,—the party, who was in the act of giving effect to it, chose to prevent it from becoming a legal and binding contract. If it does not become a legal binding act, how can equity fix upon the proceeds of property, which by law has not become liable, and which, in fact legally belongs to somebody else? Suppose, for example, the defendants had now got the ship, and if, as is admitted, they would be entitled to retain her as long

as she endures, or to make firewood of her, if they please, and the plaintiffs never could enforce their claim, it would be singular indeed, that though the property could be held in defiance of the rightful owner, and that no equity existed as regarded the property so long as it was kept in specie, yet that the moment that property was converted into money, the money might be demanded by the plaintiffs. What is that but indirectly breaking in upon the provisions of the Ship Registry Acts, and giving the plaintiffs a right or property in the vessel, though they cannot have the vessel itself? These Acts intended that the property in the vessel should go hand in hand with the right to the vessel, and that he who had the vessel should also have an equitable right to the property in the vessel. The cases, if it were necessary to go into them, would prove that. My clear opinion, therefore is, that the property in this ship did not pass to the plaintiffs, while it was in specie, and that being so, that the contract under the documents which have been produced does not give them the title which they now assert to the proceeds of that property."

The policy, however, of the Ship Registry Acts was held not to be in all cases applicable to contracts relative to the *proceeds* arising from the sale of ships, and to the produce of freight. Thus, in *Armstrong v. Armstrong*, 21 Beav. 78, shares in a British ship, purchased with his father's money, were registered in the name of the defendant, Armstrong. After the father's death, the defendant, Armstrong, entered into an agreement with his father's representatives, admitting their right, and, for valuable consideration, agreeing to sell the shares at the end of twelve months, and to account to the representatives for the proceeds. The ship was accordingly sold. It was held by Sir John Romilly, M. R., that, although the Ship Registry Acts prevented the representatives enforcing any right against the ship itself; still that they were entitled to recover the proceeds of the sale in the hands of the purchaser. "My opinion," said his Honor, "is that the agreement here does not give any interest in the ship, but is an agreement that at the expiration of the period mentioned, *the defendant, Armstrong, [*806] is to sell the shares and pay over the proceeds thereof according to the will of his father. That is exactly what Lord St. Leonards says in *M'Calmont v. Rankin*, 2 De G. Mac. & G. 424. I do not lay down any rule that parties cannot authorize a ship to be sold, and direct in what manner the money shall be applied. . . . The result is, that, in my opinion, this is an agreement which is binding on the defendant, Armstrong, that it is capable of being enforced in this Court, and that the money arising from the sale of the ship being now available, he is bound to account for it in the manner provided by this agreement." See and consider *Coombes v. Mansfield*, 3 Drew, 193; *Clarke v. Batters*, 1 K. & J. 242.

The Court has frequently stated that fraud might warrant its inter-

ference, but there is no case in the books in which the particular fraud which would create an interest in a ship has occurred. *M'Calmont v. Rankin*, 2 De G. Mac. & G. 416; *Armstrong v. Armstrong*, 21 Beav. 71, 87. It seems, however, that where a person having no title to a ship, procures it to be registered in his name, the Court of Chancery will compel him to re-transfer it to the rightful owner and account for the earnings, even though there has been no fraud, and notwithstanding "The Merchant's Shipping Act, 1854." *Holderness v. Lamport*, 29 Beav. 129.

It was, moreover, decided at law, that an action would not lie for the breach of an *executory* contract for the sale or transfer of a ship, unless the contract contained a recital of the certificate of registry, pursuant to the 8 & 9 Vict. c. 89, s. 34: *Duncan v. Tindal*, 13 C. B. 258.

When the discharge of a mortgage on a ship has been duly registered, the mortgage cannot, without contravening the policy and provisions of the Merchant's Shipping Act, 1854, be revived on an allegation that the discharge was given by mistake; *Bell v. Blyth*, 4 L. R. Ch. App. 136, 139.

The specific delivery of goods sold may now be enforced at law under the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97). See Day's Comm. Law Proc. Acts, 2nd ed., 305, 306.

An equitable defence to the enforcement of delivery of the chattel sold, may be set up as for instance that the person employed to sell, sold it by mistake at one-third of the price fixed upon it by the owner: *Isaac v. Boulnois*, 11 W. R. (Q. B.) 341.

The old Court of Bankruptcy had no jurisdiction to compel specific performance: *Ex parte Cutts*, 3 Deac. 242, overruling *Ex parte Sidebotham*, 1 Mont. & Ayr. 655; *Ex parte Barrington*, 2 Mont. & Ayr. 245. Whether the new courts have, has not yet been determined: Robs. Bkcy. 251.

2. *As to contracts relating to *personal acts.*—Although in some instances the line of demarcation between the cases [*807] already considered, principally relating to the sale of real and personal property, and some of the cases now about to be considered, is not quite clear; it is perhaps on the whole the most convenient which could be adopted.

And first with regard to contracts to do certain works. It appears that, notwithstanding some early decisions to the contrary (see 1 Madd. Ch. Pract. 361; *Buxton v. Lister*, 3 Atk. 385; *City of London v. Nash*, 6 Atk. 512, 1 Ves. 12), it is now settled that with some few exceptions the Court will not decree specific performance of contracts to build or repair (*Errington v. Aynesley*, 2 Bro. C. C. 341; 2 Dick. 692; *Lucas v. Commerford*, 3 Bro. C. C. 166; *Paxton v. Newton*, 2 Sm. & Giff. 437), to make a branch railway (*South Wales Railway Company v. Wythes*, 1 K. & J. 186, 5 De G. Mac. & G. 880), to work quarries

(*Booth v. Pollard* 4 Y. & C. Exch. 61), coal mines, (*Pollard v. Clayton*, 1 K. & J. 462), to make good a gravel pit (*Flint v. Brandon*, 8 Ves. 159).

The principal reason why the Court does not decree specific performance in such cases is, the enormous inconvenience which would attend the operations of the Court, if it were to take upon itself, as between builders, contractors, railway companies and others, the erection and construction of a large number of buildings, and probably half the railways in the kingdom. See the *South Wales Railway Company v. Wythes*, 1 K. & J. 200.

Where, however, the performance of certain acts, such as making certain buildings or repairs, is merely incidental to a contract of which the specific performance would ordinarily be decreed, such as a contract to grant a lease, the court will direct the contract for a lease to be specifically formed, and will, if necessary, direct an inquiry as to damages under *Sir Hugh Cairns' Act*, 21 & 22 Vict. c. 27, s. 2. In *Middleton v. Greenwood*, 2 De G. Jo. & Sm. 142, the defendant agreed to grant the plaintiff a lease of a public house, and to make and form therein a spirit-vault, and put in plate-glass windows, and do everything therewith necessary at his own expense, and paint new the outside of all the woodwork, as well as put the slates, chimney pots and roofing in thorough repair. The Lords Justices of the Court of Appeal, affirming the decision of Sir W. Page Wood, V. C., directed specific performance of the agreement to grant the lease, and directed the inquiry as to damages for the non-performance of the agreement with respect to the vault, windows, painting and repairs. See also *Kay v. Johnson*, 2 Hem. & Mill. 118; *Oxford v. Provand*, 2 L. R. P. C. 135; and see *Blackett v. Bates*, 2 Hem. & Mill. 270, where it was held that although a Court of Equity will

*not decree specific performance of an agreement to repair a [*808] railway simpliciter, it will do so if the agreement forms a collateral part only of a larger agreement, and the relation of lessee and lessor has been created between the parties. This case, however, was reversed on appeal by Lord Cransworth, C., 1 Law R. Ch. App. 117.

In the case of *Moseley v. Virgin*, 3 Ves. 185, Lord Rosslyn said, that if an agreement for building were in its nature defined, there would be no great difficulty in decreeing specific performance. And see *Stor. Eq. Jur.* s. 728; *Cubitt v. Smith*, 10 Jur. N. S. 1123.

But an agreement for building a house of a certain value is not one which the Court will direct to be specifically performed, for the Court would have great difficulty in determining whether its decree had or had not been performed, and it might lead to much litigation. See *Brace v. Wehnert*, 25 Beav. 348. There A. agreed to grant a lease to B. as soon as B. should have built a house with the necessary outbuildings on the land of the value of 1400*l.* at the least, "according to a plan to be submitted to and approved by A." B. agreed to build and

take the lease. No plan has been approved of. It was held by Sir J. Romilly, M. R., that no decree could be made for specific performance, and a bill filed by A. for that purpose was dismissed with costs. And see *Norris v. Jackson*, 1 J. & H. 319.

At all events the court has jurisdiction to enforce specific performance of a contract by a defendant to do defined work upon his own property, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages: *Storer v. Great Western Railway Company*, 2 Y. & C. C. C. 48, where Sir J. L. Knight Bruce, V. C., made an order that the defendants, the company, were bound to construct and for ever thereafter to maintain one neat archway sufficient to permit a loaded carriage of hay to pass under the railway. See also *Sanderson v. The Cockermouth and Workington Railway*, 11 Beav. 497; *Lytton v. Great Northern Railway Company*, 2 K. & J. 394; *Wilson v. Furness Railway Company*, 9 L. R. Eq. 28; *Attorney-General v. Mid-Kent Railway Company and South Eastern Railway Company*, 3 L. R. Ch. App. 100; *Greene v. West Cheshire Railway Company*, 13 L. R. Eq. 44. So in *Franklin v. Tuton*, 5 Madd. 469, the defendant was lessee from the plaintiff of certain building ground and covenanted that the house to be built by her should correspond with the adjoining houses already built, in its elevation. The bill was to compel the defendant, who had not conformed to the covenant, to alter the elevation accordingly, and Sir John Leach, V. C., decreed according to the prayer of the bill.

A similar order was indirectly *made by Lord Eldon in *Lane v. Newdigate*, 10 Ves. 192, where although he refused to make [*809] an order on the defendant specifically to repair the banks of a canal and stop-gates and other works, his Lordship nevertheless made an order by which the same effect was obtained, the defendant being restrained from impeding the plaintiff from navigating, using, and enjoying the canal, by continuing to keep the canal banks, or works out of repair, by diverting the water, or continuing the removal of a stop-gate.

Another ground which makes a Court of equity more anxious to decree specific performance of a contract to do certain works, as to build or to make a road, is, when the plaintiff, by reason of his having parted with his land to the defendant, has no opportunity of erecting the buildings at his own cost, and so ascertaining the amount of damages sustained by reason of the non-performance of the contract; *The South Wales Railway Company v. Wyth-s*, 1 K. & J. 200; and see *Price v. The Corporation of Penzance*, 4 Hare, 506; *Storer v. The Great Western Railway Company*, 3 Railw. Ca. 106, 2 Y. & C. C. C. 48; *Soames v. Edge*, Johns. 669; *Wilson v. Furness Railway Company*, 9 L. R. Eq. 28.

Again, where there have been acts amounting to a part performance of the contract, the Court will compel specific performance, which,

without such acts, it might not do: *Price v. Corporation of Penzance*, 4 Hare, 506, 509; see also *Pembroke v. Thorpe*, 3 Swanst. 437, n.; *Sanderson v. Cockermouth and Workington Railway Company*, 11 Beav. 497; *Oxford v. Provand*, 2 L. R. P. C. 135; *Crook v. Corporation of Seaford*, 10 L. R. Eq. 678.

And it has been held to be no defence to a bill for specific performance, by a private individual against a railway company that, the public would be subjected to inconvenience if the company were compelled specifically to perform their contract with such individual. See *Raphael v. Thames Valley Railway Company*, 2 L. R. Ch. App. 147, there the plaintiff, a landowner, had withdrawn his opposition to a railway bill, in consideration of the company agreeing to make a road and an approach in a particular manner. The company altered the level of their line, and varied the course and inclination of their road. The bill was filed pending the works, and a motion for an injunction had been ordered to stand to the hearing, on the company undertaking to abide by the direction of the Court as to altering the works. It was held by Lord Chancellor Chelmsford, reversing the decision of Lord Romilly, M. R. (2 L. R. Eq. 37), that the plaintiff was entitled to specific performance; and that the company could not set up the inconvenience to the public by the interference with the traffic, as a reason for [*810] *not performing their agreement. See also *Wilson v. Furness Railway Company*, 9 L. R. Eq. 28; *Attorney-General v. Mid-Kent Railway Company and South Eastern Railway Company*, 3 L. R. Ch. App. 100.

It seems that as a general rule the Court of equity will not decree a specific performance of an agreement to enter into and carry on a partnership: per Sir G. M. Giffard, V. C., in *Scott v. Rayment*, 7 L. R. Eq. 112. There are, however, some very limited exceptions to the rule, such for instance as the Court going the length of decreeing the execution of a deed (*Ib.*), in cases where it was essential to the ends of justice that the status of the parties should be ascertained, determined, and fixed; and there has been a part performance of the contract to enter into partnership for a fixed and definite term (*Anon.*, 2 Ves. 629; *England v. Curling*, 8 Beav. 129; *Hibbert v. Hibbert*, Coll. on Partnership, p. 133); but it will not do so when the amount of capital and the mode by which it is to be provided is undefined (*Downs v. Collins*, 6 Hare, 418, 437; nor will it do so when no term has been fixed for the duration of the partnership, for such a decree would be useless when either of the parties might dissolve the partnership immediately afterwards: *Hercy v. Birch*, 9 Ves. 357; and see *Sheffield Gas Consumers' Company v. Harrison*, 17 Beav. 294. It has, however, been suggested by Mr. Swanston in his learned note to *Crawshay v. Maule*, 1 Swanst. 513, that in many cases, although the partnership could be immediately dissolved, the performance of the agreement, like the execution of a lease,

after the expiration of the term (see *Nesbitt v. Meyer*, 1 Swanst. 226), might be important as investing the party with legal rights for which he had contracted.

Upon the same principle the Court will not decree specific performance of a contract to grant a lease, when a lease, if granted, might be determined at once for the breach of a covenant which the plaintiff had already broken: *Jones v. Jones*, 12 Ves. 188.

The Court has refused to grant specific performance of an agreement for a tenancy from year to year, upon the ground apparently that the remedy at law was adequate: *Clayton v. Illingworth*, 10 Hare, 451.

Again, as contracts of hiring and service are of a confidential character, and cannot therefore be enforced against an unwilling party with any hope of ultimate success, courts of equity, although a different opinion was formerly entertained (*Ball v. Coggs*, 1 Bro. P. C. 140, Toml. Ed.; *East India Company v. Vincent*, 2 Atk. 83), now refuse to decree specific performance of them: *Johnson v. Shrewsbury and Birmingham Railway Company*, 3 De G. Mac. & G. 914; *Horne v. The London and North Western Railway Company*, 10 W. R. (V. C. W.) 170; [*811] *Pickering v. Bishop of Ely*, 2 Y. & C. C. C. 249; so in *Stocker v. Brocklebank*, 3 Mac. & G. 250; *Brett v. The East India and London Shipping Company, Limited*, 12 W. R. (V. C. W.) 596; *Mair v. Himalaya Tea Company*, 1 Law Rep. Eq. 411.

The specific performance of a contract of agency will not be enforced in equity. Thus in *Chinnock v. Sainsbury*, 30 L. J. N. S. (Ch.) 409, auctioneers advanced a sum of money to J. S., who agreed to put a miscellaneous collection of property into their hands for sale, from the proceeds of which they were to retain the money advanced. A part only of the property was delivered and sold, but it realized less than the sum advanced. J. S. refused to part with the remainder of his collection, and upon demurrer to a bill for a specific performance of the agreement, it was held by Sir J. Romilly, M. R., that the Court would not compel the performance of a contract of agency; that J. S., if he satisfied the claims of his agents, was at liberty to countermand the sale of his property; that the advance of money to J. S. was not made on the security of the property mentioned in the contract; and that the claims of the agents must be determined in a court of law, and the demurrer was allowed.

The Court will not decree specific performance of a contract for the sale of the goodwill of a business unconnected with the premises where the business is carried on; *Baxter v. Conolly*, 1 J. & W. 576; *Bozon v. Farlow*, 1 Mer. 459, 474; but where the goodwill is altogether or principally annexed to the premises, a contract for the sale of the goodwill and premises may be enforced in equity: *Cruttwell v. Lye*, 17 Ves. 335; *Shackle v. Baker*, 14 Beav. 468; *Chissum v. Dewes*, 5 Russ. 29; *Darbey v. Whitaker*, 4 Drew. 134, 139, 140.

And although at one time it was doubtful whether a contract for the sale of the business of an attorney was legal (see *Candler v. Candler*, Jac. 231; *Bozon v. Farlow*, 1 Mer. 459; *Thornbury v. Beville*, 1 Y. & C. C. C. 554; *Gilfillan v. Henderson*, 2 C. & F. 1), it seems now that it is held valid at law (*Bunn v. Guy*, 4 East. 190), and will be enforced in equity: *Whittaker v. Howe*, 3 Beav. 383; *Aubin v. Holt*, 2 K. & J. 66.

The Court of equity will compel specific performance of agreements for separation between husband and wife, by decreeing the execution of proper deeds of separation, provided there be a good consideration to support the contract, as, for instance, a covenant by trustees to indemnify the husband against the wife's debts (*Stephens v. Olive*, 2 Bro. C. C. 90; *Earl of Westmeath v. Countess of Westmeath*, Jac. 126, 141; *Elworthy v. Bird*, 2 S. & S. 372, and see *Wellesley v. Wellesley*, 10 Sim. *256), or a covenant by a third person to pay the husband's debts: *Wilson v. Wilson*, 1 Ho. Lo. Ca. 538; 5 Ho. Lo. 40. So, the staying by the wife of a suit in the ecclesiastical court for nullity of marriage against her husband on the ground of impotency (*Wilson v. Wilson*, 14 Sim. 405, 1 Ho. Lo. Ca. 538), or her acceptance of maintenance from her husband instead of proceeding against him, by a divorce a mensa et thoro (*Hobbs v. Hull*, 1 Cox, 445), has been held a good consideration as against him. And the Court will also compel the husband by injunction, pursuant to his covenant, not personally to molest his wife: *Sanders v. Rodway*, 22 L. J. (N. S.) Ch. 230, although it seems doubtful whether it will restrain proceedings in a suit for restitution of conjugal rights; *Wilkes v. Wilkes*, 2 Dick. 791; *Vansittart v. Vansittart*, 4 K. & J. 62; *Hope v. Hope*, 8 De G. Mac. & G. 731, and see note to *Stapilton v. Stapilton*, vol. ii. post.

A Court of equity will not decree the specific performance of a covenant to refer disputes to arbitration (*Price v. Williams*, cited 6 Ves. 818; *Street v. Rigby*, 6 Ves. 815; *Wilks v. Davis*, 3 Mer. 507; *Gervais v. Edwards*, 2 Dr. & W. 80), and a plea of an agreement to refer to arbitration will not constitute a valid objection to a bill either for discovery only or for discovery and relief (*Wellington v. Macintosh*, 2 Atk. 569; *Street v. Rigby*, 6 Ves. 815, overruling *Halfhide v. Fenning*, 2 Bro. C. C. 336; *Dimsdale v. Robertson*, 2 J. & Lat. 58, 91; but see and consider *The British Empire Shipping Company v. Somes*, 3 K. & J. 433; *S. C.*, nom. *Somes v. The British Empire Shipping Company*, 8 Ho. Lo. Ca. 338); although before the bill was filed arbitrators were appointed, and since the bill was filed the submission has been made a rule of Court: *Cooke v. Cooke*, 4 L. R. Eq. 77; nor could the Court substitute the Master for the arbitrators, "for this," observed Sir J Leach, "would be to bind the parties contrary to their agreement:" *Agar v. Macklew*, 2 Sim. & Stu. 418.

But it seems to be doubtful, if the agreement to submit to arbitration

contains also a covenant not to take proceedings at law or in equity, whether, in that case, the submission may not be pleaded in bar of proceedings in any superior Court: *Halfhide v. Fenning*, 2 Bro. C. C. 336; 2 Dick. 702; *Dimsdale v. Robertson*, 2 J. & Lat. 58, 91; and see *Cooke v. Cooke*, 4 L. R. Eq. 77.

Where there is a contract for a sale at a price to be determined upon by certain persons as valuers, the Court, unless the price be fixed in the manner determined upon, so as to be made part of the agreement, will not ordinarily decree specific performance thereof (*Milnes v. Grey*, 14 Ves. 400; *Wilkes v. Davis*, 3 Mer. 507; * *Vickers v. Vickers*, [*813] 4 L. R. Eq. 529; *Collins v. Collins*, 26 Beav. 306; *Richardson v. Smith*, 5 L. R. Ch. App. 648), and it is immaterial whether the price has not been ascertained, in consequence of the failure of the nomination of the valuers, or if, when appointed, they do not make their award, or one of the parties will not allow his valuer to proceed (*Id.*), the Court refusing to act, because the contract is not complete. "The Court has adopted this principle from the civil law as stated in the Code of Justinian, who seems to have taken pride in having decided a point which he said was a knotty point, and had occasioned great controversy among lawyers—namely, if a given man is to name the price, whether that is to be considered as equivalent to the arbitrium boni viri. The Emperor Justinian determined that if Titus be unable or unwilling to declare the price, the sale is null:" Per Sir W. Page Wood, V. C., in *Vickers v. Vickers*, 4 L. R. Eq. 535; and see Inst. 3, 24, 1; Cod. 4, 38, 15.

Where the fixing a value by arbitrators is not of the essence of an agreement, the Court will carry the agreement into effect, and will, itself, if necessary, ascertain the value. See *Dinham v. Bradford*, 5 L. R. Ch. App. 519: there two partners made an agreement containing a provision that on the determination of the partnership one partner should purchase the share of the other at a valuation to be made by two persons, one appointed by each partner, and the partnership was carried on for some time under that agreement. It was held by Lord Hatherley, L. J., affirming the decision of Sir John Stuart, V. C., that though the valuation could not be made, because no umpire was provided, the Court would carry the partnership agreement into effect by ascertaining the value of the share. "This case," said his Lordship, "is not like that of the sale of an estate, the price of which is to be settled by arbitration; but is a case in which the whole scope and object of the deed would be entirely frustrated if the Court were to apply the well-known doctrine to the present state of circumstances. In cases of specific performance the matter is very plain and simple. One person agrees to sell his estate in a given way, and no rights are changed by the circumstance of that method of selling the estate having failed. The estate remains where it was, and the money where it was. But here is a man who has had the whole benefit of the partner-

ship in respect of which this agreement was made, and now he refuses to have the rest of the agreement performed, on account of the difficulty which has arisen. It is much more like the case of an estate sold, and the timber on a part to be taken at a valuation, the adjusting [*814] of matters of that sort forming part of the arrangement *but being by no means the substance of the agreement; and in such cases the Court has found no difficulty. If the valuation cannot be made *modo et forma*, the Court will substitute itself for the arbitrators. It is not the very essence and substance of the contract, so that no contract can be made out except through the medium of the arbitrators. Here the property has been had and enjoyed, and the only question now is, what is right and proper to be done with regard to settling the price?" *Jackson v. Jackson*, 1 Sm. & G. 184.

An inequitable refusal, however, of a plaintiff to submit to arbitration according to contract, may disentitle him to relief in equity: *Cheslyn v. Dalby*, 2 Y. & C. Exch. Ca. 170.

The Court will decree specific performance of an award, where it is to do anything in specie, as to convey an estate or assign securities (*Norton v. Mascall*, 2 Vern. 24; *Hall v. Hardy*, 3 P. Wms. 187), but not, it seems, an award to pay money: *Hall v. Hardy*, 3 P. Wms. 189, note.

The Court thus exercises jurisdiction, "because," to use Lord Eldon's language, "the award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person:" *Wood v. Griffith*, 1 Swanst. 54. See also *Nickels v. Hancock*, 7 De G. Mac. & G. 300.

The right of a person to have specific performance of an award is the same as if the award had been an agreement between the parties, and the Court will not decree specific performance of an award in a case where, if the award had been an agreement, specific performance would have been refused. See *Blackett v. Bates*, 1 Law Rep. Ch. App. 117, there, by an award made in June, 1863, under a reference at Nisi Prius, the arbitrator awarded that the defendant should execute to the plaintiff a lease of the right to use such part of a certain railway made by the plaintiff as was upon the land of the defendant, the lease to be made in the words set out in the award; and that the defendant should have a right of running carriages on the whole line on certain terms, and might require the plaintiff to supply engine power, while the plaintiff should have an engine on the railway; and that the plaintiff should during the term keep the whole railway in good repair. The lease did not provide for these privileges awarded to the defendant. The plaintiff applied at law to set aside the award, and ultimately in April, 1864, the application was refused. In July, 1864, the plaintiff filed his bill for specific performance of the award. It was held by Lord Cranworth, C., reversing the decree of Sir W. Page Wood, V. C. (2 H. & M. 270),

that specific performance could not be decreed, inasmuch as the provisions in favour of *the defendant could not be enforced at once, but gave the defendant a right to have certain duties continuously performed by the plaintiff for a number of years, and the Court could not see to such performance. "The rights of the parties," said his Lordship, "in respect of specific performance are the same as if the award had been simply an agreement between them. Had it been an agreement, would there have been a case for specific performance? I think not; and for this short and simple reason—that the Court does not grant specific performance unless it can give full relief to both parties. Here the plaintiff gets at once what he seeks—the lease; but the defendant cannot get what he is entitled to, for his right is not a right to something which can be performed at once, but a right to enforce the performance by the plaintiff of daily duties during the whole term of the lease. The Court has no means of enforcing the performance of these duties—all it can do is to punish the plaintiff by imprisonment or fine, if he does not perform them. . . . If the arbitrator instead of awarding that the plaintiff should do certain acts, had awarded that the lease to be executed should contain covenants by the plaintiff to do them, the case would have stood on an entirely different footing. The Court would not then have been called upon to enforce, either directly or indirectly, the doing of those acts, but merely to decree the execution of a lease containing certain covenants, a kind of relief, which is clearly within the jurisdiction of the Court, and open to no objection."

And the jurisdiction of courts of equity to decree specific performance of awards has not been ousted by the 17th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). *Ib.* And see *Dart. V. & P.* 208, 4th edit.

Specific performance compelled by injunction.—Where a person has entered into a contract not to do a thing, specific performance of such negative contract will be enforced by an injunction restraining him from doing anything in contravention of it. Thus a court of equity has restrained parties from ringing a bell (*Martin v. Nutkin*, 2 P. Wms. 266), carrying on a trade (*Barret v. Blagrove*, 5 Ves. 555; *S. C.*, 6 Ves. 104; *Williams v. Williams*, 2 Swanst. 253; 3 Mer. 157; and see *Shackle v. Baker*, 14 Ves. 468; *Cruttwell v. Lye*, 17 Ves. 335; *Newbery v. James*, 2 Mer. 446; *Harrison v. Gardner*, 2 Madd. 198), acting on the stage (*Anon*, 6 Sim. 351 cited, *Lumley v. Wagner*, 1 De G. Mac. & G. 604), carrying on a particular trade in a certain place or district (*Clements v. Welles*, 1 Law Rep. Eq. 200; *Clarkson v. Edge*, 12 W. R. (M. R.) 518. See, also, *Fielden v. Slater*, 7 L. R. Eq. 523; *Jones v. Bone*, 9 L. R. Eq., 674; *Carter v. Williams*, *Ib.* 678), even in the case of an infant if he represented himself to be of full age (*Cornwall v. Hawkins*, 41 L. J. (N. S.) 435), erecting buildings

(*Rankin v. Huskisson*, 4 Sim. 13), or buildings above a certain height (*Lloyd v. London, Chatham and Dover Railway Company*, 2 De G. Jo. & Sm. 568; *Bowes v. Law*, 9 L. R. Eq. 636), or making applications to parliament (*Ware v. Grand Junction Waterworks Company*, 2 Russ. & My. 470, 483; *Heathcote v. North Staffordshire Railway Company*, 2 Mac. & G. 100; *Lancaster and Carlisle Railway Company v. North Western Railway Company*, 2 K. & J. 293), contrary to an agreement not to do such acts. See *Taylor v. Davis*, 3 Beav. 388 n.

Upon the same principle a railway company has been restrained from allowing, contrary to its contract with a landowner, any of its ordinary or fast trains, other than mail, express, or special trains, to pass a station without staying there for the purpose of taking up and setting down passengers; *Hood v. North Eastern Railway Company*, 8 L. R. Eq. 666; 5 L. R. Ch. App. 525. See, also, *Rigby v. The Great Western Railway Company*, 15 L. J. N. S. 266; 2 Ph. 44. See, also, *Phillips v. Great Western Railway Company*, 7 L. R. Ch. App. 409; 20 W. R. (L. C. and L. J.) 562.

But it seems that a Court of Equity will not grant an injunction restraining the doing of an act contrary to a stipulation which is merely ancillary to an agreement of which the Court cannot compel the specific performance. See *Merchants' Trading Company v. Banner*, 12 L. R. Eq. 18; there a firm of shipbuilders agreed to alter a vessel according to a specification, and it was provided that in case of their failure to execute the alterations according to the agreement, the owners of the vessel should be at liberty, with workmen, to enter on the shipbuilders' yard, and themselves complete the alterations. The shipbuilders were adjudicated bankrupts before the vessel was completed. Upon a bill filed by the owners against the trustee under the bankruptcy, praying a declaration that the plaintiffs were entitled to complete the alterations in the vessel, and asking for an injunction to restrain the defendant from selling the dock in which the vessel was lying, or interfering with the right of the plaintiff to complete the vessel, Lord Romilly, M. R., allowed a demurrer to the bill. "The real principle," said his Lordship, "is that where the stipulation sought to be enforced is really a part of the contract itself, this Court cannot specifically perform the contract piecemeal, but it must be performed in its entirety if performed at all; and where the Court cannot perform it in its entirety, neither can it perform any particular portion of it."

[*817] *3. *As to the extension of the jurisdiction of equity in matters of specific performance by the legislature conferring power to award damages in certain cases.*—The jurisdiction of the Court of Chancery with regard to specific performance, has been much enlarged by the Chancery Amendment Act, 21 & 22 Vict. c. 27 (Lord Cairns' Act), which takes effect from and after the 1st of November, 1858. It

enacts that in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct. Sect. 2. Subsequent sections provide the machinery for the assessment of damages and the trial of questions of fact either by a jury before the Court itself, or by the Court alone (sects. 3, 4, 5), or for the assessment of damages by a jury before any judge of one of the superior courts of common law, at nisi prius, or before the sheriff of any county or city. Sect. 6.

This act, which is not retrospective (*Wicks v. Hunt*, Johns. 372, 380), does not extend the jurisdiction of the Court to cases where there is a plain common law remedy, and where the Court would not have interfered before the passing of the act.—*Ib.*

The Court, therefore, cannot award damages save in those cases where it has jurisdiction to decree specific performance, and in addition to or substitution for that remedy. Hence it has been decided that as a Court of equity has no jurisdiction to compel specific performance of an agreement to borrow a sum of money, it cannot award compensation or damages against a person who has refused to accept a loan of money for which he had contracted. *Rogers v. Challis*, 27 Beav. 175. So as the Court would not compel specific performance of an agency contract, it cannot grant damages for the breach of such contract. *Chinnock v. Sainsbury*, 30 L. J., N. S., Ch. 409. See, also, *Scott v. Rayment*, 7 L. R. Eq. 112.

So where the plaintiff fails to establish any covenant, contract, or agreement of which specific performance can be directed, the Court has no jurisdiction to grant relief in damages: *Lewers v. The Earl of Shaftesbury*, 2 L. R. Eq. 270.

Where the Court, however, has jurisdiction to grant specific performance, it may award damages *for non-performance of part of the contract, in respect of which it could not have com- [*818] pelled specific performance. Thus, in *Soames v. Edge*, Johns. 669, the plaintiff agreed to grant a lease to the defendant, when and so soon as he, the defendant, should have built a new house on the land, and the defendant agreed to accept such lease when required, and by a certain day to pull down an old house then standing on the land, and build a new one on the site. The defendant, who was previously in the occupation of the premises, in pursuance and part performance of the agreement, caused the old house to be pulled down, and sold the materials and continued in possession, and

paid part of the rent which accrued due, but did not proceed to build a new house upon the old site. It was held by Sir W. Page Wood, V. C., on demurrer to a bill praying specific performance and damages, that the Lord Cairns' Act applied, and that the plaintiff was entitled to damages for the non-building of the house, and to specific performance of the contract to accept the lease. "It is perfectly true," said his Honor, "that I cannot act until I have jurisdiction, and under the existing law, before the passing of this act (Lord Cairns'), a court of equity had not jurisdiction in respect of a building contract of this description. But it would have had jurisdiction, before the passing of the act, to compel the defendant to accept a lease on the plaintiff waiving the condition which he for his own benefit inserted, that he should not be called upon to grant a lease until a certain time. The defendant has agreed to accept a lease when required, and the Court has therefore jurisdiction. The statute would not apply to a case where the object of the agreement was, simply, the building of the house under such conditions and on such terms that it may be assumed the Court could not grant specific performance; and in such a case a plaintiff could not file a bill to have damages instead of specific performance, because there would be no jurisdiction. But there is a distinct agreement here, not only to build the house, but to accept the lease. The Court, having, therefore, acquired jurisdiction; may give damages either in addition to or in substitution for specific performance. The meaning of the statute can only be, that where the Court has jurisdiction in the suit, it may award damages in the substitution for specific performance. . . . This is a case above all others in which this very beneficial act should be applied. Here is a person in possession, who has pulled down the house, and remains in possession, and refuses to do that upon which the plaintiff would be bound to grant a lease. The plaintiff says, 'I want my house built, or damages for the default; and then I require you to *accept a lease.' The [*819] demurrer must be overruled with costs."

But a plaintiff will not be entitled to damages if he has done any act which would disentitle him to specific performance: *Collins v. Stutely*, 7 W. R. (M. R.) 710.

The power to give damages under this act is discretionary, and the Court will not give damages where the question of damages can be more satisfactorily tried at law: *Durell v. Pritchard*, 1 Law Rep. Ch. App. 244.

The object of Lord Cairns' Act, it will be seen, is to enable the Court of Chancery to do complete justice in cases where it previously had jurisdiction, but where circumstances had occurred which disabled the Court from decreeing specific performance, and so rendered it necessary for the plaintiff to seek relief in a court of law for damages. If, for instance, before the passing of the act, upon a bill being filed

for the specific performance of a contract for the purchase of an estate, it appeared that the vendor could not make a title to the estate, the bill would have been dismissed, and the vendor would have been obliged to resort to a court of law for damages; under the act, the Court of Chancery is able to do complete justice between the parties—by the award of adequate damages for the non-performance of the contract.

As Lord Cairns' Act does not diminish the rights of suitors, a plaintiff in equity, who, before the act, would have been allowed at the same time to sue the defendant at law for damages, may still do so, although he might, under the act, pray for and obtain damages in the suit. See *Anglo-Danubian Company v. Rogerson*, 4 L. R. Eq. 3; there A. filed a bill against B., for the cancellation of bills of exchange, drawn by B. and accepted by A., in part performance of a contract, of which B. failed to perform his part, and for an injunction to restrain B. from parting with or suing on the bills; and pending the suit, A. commenced an action against B. for damages for breach of the contract. It was held by Lord Romilly, M. R., that the suit and action were not for the same matter, and an order to elect obtained by B. was discharged.

Under Rolt's Act (25 & 26 Vict. c. 42), the Court of Chancery must determine every question of law and fact incident to the relief sought.

Agreements for leases are within the 4th clause of the 1st section of the County Court Equity Act, authorising decrees for specific performance: *Wilcox v. Marshall*, 3 L. R. Eq. 270.

The specific performance of contracts, belongs rather to the extraordinary jurisdiction of the Court of Chancery. It is not a matter of course, in all cases. It rests upon a sound, judicial discretion; *Blackwelder v. Loveless*, 21 Ala. 371; *Duvall v. Myers*, 2 Maryland Ch. 401; *Waters v. Howard*, 1 Id. 112; *Cooper v. Pena*, 21 California, 403, 411; *Quinn v. Roath*, 37 Conn. 16; *M-Comas v. Easeley*, 21 Grattan, 23; *Hale v. Wilkinson*, Id. 75; *Fish v. Lightner*, 44 Missouri, 268; *Palmer v. Graham*, 1 Parson's Eq. 476. It is not given because there is no remedy at all at law; for there is always at law a remedy in damages for the breach of a con-

tract. It is given because the legal remedy of damages is, in certain cases, not a complete remedy; and, of course, it is confined to cases where a compensation in money is not adequate, or not practicable: see *Seymour v. Delancey*, 3 Cowen, 446, 505.

This form of relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case. The jurisdiction, said Lord Erskine, in *Radcliffe v. Warrington*, 12 Vesey, 332, "is not compulsory upon the court, but the subject of discretion. The question is not what the court must do, but

what it may do under the circumstances, either exercising the jurisdiction by granting the specific performance or abstaining from it;"

Willard v. Taylor, 8 Wallace, 565.

More than ordinary latitude is allowable in this regard where the vendor seeks to compel the payment of the purchase-money, because pecuniary compensation may be had at law, and it is not unfrequently better and more consonant with natural equity, that the seller should retain the land with an equivalent for the loss of his bargain, than that the purchaser should be compelled to take what he does not want, and may be unable to use; *Whitney v. The City of New Haven*, 23 Conn. 624; *Webb v. The London and Portsmouth Railway Co.*, 9 Hare, 129, 1 De G. M. & G. 521; see *The Old Colony Railroad v. Evans*, 6 Gray, 25. And it has been said, that chancery will seldom, if ever, compel a municipal corporation, railway company, or other body representing or acting on behalf of the public, to fulfil an executory contract for the purchase of real estate, which has not been partially performed; *Whitney v. The City of New Haven*; *Webb v. The London and Portsmouth Railway*.

The discretion is, nevertheless, judicial, to be exercised in obedience to established principles; and "where a contract respecting real property is, in its nature and circumstances, unobjectionable, it is as much a matter of course for a court of equity to decree a specific performance of it, as it is for a court of law to give damages for

the breach of it;" *Story's Equity*, sect. 751; *Old Colony Railroad Co. v. Evans*, 6 Gray, 36.

It is held in general that when the purchaser is entitled to a specific performance, a like remedy may be afforded to the vendor, not merely from a regard for mutuality, but because the measure of damage for the non-fulfilment of an executory contract is the difference between the stipulated price and the market value of the commodity at the time of the breach; *The Old Colony R. R. v. Evans*, 6 Gray, 25; *Cook v. Grant*, 16 S. & R. 198, 202, ante. See *Whitney v. DeHaven*, 31 Conn.; *Webb v. Railway Co.*, 9 Hare, 129; 1 De Gex, M. & G. 521; *Springs v. Sanders*, Phillip N. C. Eq. 67. In Pennsylvania, equity may be administered through legal forms; and it has been held that the vendor must bring suit, unless there is some peculiar feature which takes the case out of the general rule. *Kaufman's Appeal*, 3 P. F. Smith, 383. The distinction is nominal rather than real, because the action is subject to all the considerations that would affect a chancellor; *Cook v. Grant*; and a bill may be filed if the contract stands in need of the specific relief which a chancery alone can furnish. See *Kaufman's Appeal*; *Tripp v. Fisher*, 6 P. F. Smith, 428.

There are two grounds upon which a court of equity decrees specific execution of contract, on account of damages at law being an insufficient remedy. 1. One of these is where there is something particular and specific in the sub-

ject of the contract, which cannot be at all represented by damages. 2. The other is, where the measure of damages at law is uncertain or unascertainable, owing to the contingent nature of the property, so that the only method of giving the purchaser the exact value of his purchase, is to give him the thing itself. The first of these exists, where it is apparent that the object contemplated by the purchaser was not a general profit, which could be represented by money, but some special, peculiar purpose of use or enjoyment, which could be satisfied only by having the individual thing itself for which he had bargained; *Kirksey v. Fike*, 27 Alabama, 383; see *Neilly v. The Merchants' Insurance Company*, 19 Ohio, 452. In these cases, there is something in the contract for which the law does not profess to give a remedy; for its damages are based upon the general value of the article, and not on the special value which it has for the purchaser under all the circumstances of the case. Accordingly, on this ground, contracts for real estate will generally be decreed, because there is something specific in every piece of land, as, situation, title, &c.; and a contract for the sale of a chattel which has something peculiar and individual in its nature, as, a family picture, or relic, may be decreed; but a contract for a chattel not specific or individual, but merely answering a general description, as, so much merchandise or stock, is not decreed by a court of chancery; for the law gives

what was the substantial object of the parties in entering into the contract, viz.: a money profit; *Ferguson v. Paschall*, 11 Missouri, 267; *Scott v. Bellgeny*, 4 Mississippi, 119; 2. The other ground is the uncertain measure of damages at law, or rather the impossibility of ascertaining the real damages, which exists in regard to certain special contracts; *Woodward v. Aspinwall*, 3 Sandford's S. C. 272; *Summers v. Bean*, 13 Grattan, 404, 419.

The general principle is well settled in this country, that a court of chancery does not interfere to enforce specific performance of contracts relating to chattels, because chattels generally are not specific in the sense here meant, and one article of the same character serves as well as another: *Caldwell, &c., v. Myers and Wife*, Hardin, 551; (see, however, *Meriwether v. Booker and Wife*, 5 Littell, 254); *Madison v. Chinn*, 3 J. J. Marshall, 230; *Dalzell v. Crawford*, 2 Pennsylvania Law Journal, 17, 19; *Ins. Co. of N. A. v. Union Canal Co. et al.*, Ib. 65, 67; *Savary v. Spence*, 13 Alabama, 561; *Babur v. Babur*, 24 Maine, 42; *The Justices v. Croft*, 18 Georgia, 473; *Roundtree v. M'Lain*, 4 Hempstead, 245; *Waters v. Howard*, 1 Maryland, Ch. 112, 118. "It is a general rule," said the chancellor, in *Hoy v. Hansborough et al.*, 1 Freeman's Chancery, 533, 543, "that a court of equity will not decree a specific performance of a mere personal covenant sounding in damages, nor of a contract relating to personalty, where com-

pensation may be had at law." "It is contended," said Daggett, C. J., in *Cowles v. Whitman*, 10 Connecticut, 121, 124, "that a bill will not lie for the specific execution of a contract relating to personal chattels merely, because there is an adequate remedy at law; and for this position several cases are cited, and many more might be cited. As a general rule, it is true. As contracts for the delivery of corn, flour, stock in banks or in the funds, and the like, may be compensated in damages, courts of equity will leave the parties to their remedy at law: *Buxton v. Lister et al.*, 3 Atk. 383; 2 Swift's Digest, 17. There can be no difference between these five shares of bank stock and any other like number." It is in common course of the court," said Dessausure, C., in *Brown v. Gilliland*, 3 Dessausure, 539, 541, "to decree the specific execution of contracts respecting real estates; and it is equally the settled course of the court to refuse to decree the specific execution of contracts, as to some kinds of personal chattels, particularly stock. See *Gram v. Stebbins*, 6 Paige, 124; *Austin v. Gillespie*, 1 Jones' Eq. 261; *Fish v. Johnson*, 2 Id. 149; *Ferguson v. Paschall*, 11 Mississippi, 267.

[The rule applies a fortiori when the contract is executory, and no right has vested under it on either side. In *The Strassburgh Railway Co. v. Echternacht*, 9 Harris, 220, Black, J., said, that if an agreement between two or more persons to take a certain number of shares in a railway company, if

it should be incorporated by the Legislature, was obligatory on the parties, it could not be specifically enforced by the company. They were strangers to the contract, and no consideration moved from them. If they were injured, which did not appear, the legal remedy was full and complete, and there was no ground for the intervention of a chancellor. In like manner, where a mail contractor sought to compel a plank road company, to permit the execution of an agreement for the transportation of the mail over their road, a decree was refused, because the bill disclosed no sufficient reason for believing that redress could not be obtained by a suit for damages; *Powel v. Central Plank Road Company*, 24 Alabama, 441.]

On the other hand, it is well settled that the specific performance of personal contracts may be decreed in those exceptional cases, which fall within the reasons upon which the practice of enforcing contracts relating to real estate rests, namely, that compensation in damages would be inadequate. "Notwithstanding this distinction between personal contracts for goods, and contracts for lands, is to be found laid down in the books, as a general rule," said Thompson, J., in delivering the opinion of the court in *The Mechanics' Bank of Alexandria v. Selon*, 1 Peters, 300, 305, "yet there are many cases to be found where specific performance of contracts, relating to personalty, have been enforced in chancery; and courts will only weigh with greater nicety, con-

tracts of this description, than such as relate to lands."

[The principles which pervade and govern this branch of equitable jurisdiction, are the same, whether real or personal property is in question, although a contract for the conveyance of land is *prima facie*, within their operation, while the presumption is the other way in the case of chattels; *Dalzell v. Crawford*, 1 Parson's Eq. 37, 42; *The Mechanics' Bank v. Seton*, 1 Peters, 299; *Kirksey v. Fike*, 27 Alabama, 283; *Summers v. Bean*, 13 Grattan, 404, 411.

A contract to transfer or deliver stock may, therefore, be specifically enforced when there is no sufficient legal remedy; *Todd v. Taft*, 7 Allen, 371; and in *Fish v. Johnson*, 2 Jones' Eq., the court held in conformity with the English authorities, that shares in a railway company differ from the funded debt of the government, in not being always in the market, and having a specific value, and are therefore fit subjects for a decree of specific performance. A contract to insure falls within the same category; *Carpenter v. The M. Ins. Co.*, 4 Sandford Ch. 408; and so does the sale of a patent: *Corbin v. Tracy*, 34 Conn. 325; because the value is speculative and uncertain, and there is no measure of damages.

In like manner a chancellor may enforce an antenuptial contract, that the wife shall relinquish her right of dower, in consideration of the transfer of certain shares of stock; *Tarbill v. Tarbill*, 9 Allen, 278, or that real and personal prop-

erty shall be settled to her separate use, in consideration of an agreement on her part to forego all interest in her husband's estate; *Bateman v. Porter*, 9 Allen, 234. So a purchaser of the good will of a business, who promises that it shall be returned intact if he is unable to comply with the terms of the agreement, may be enjoined not to divert custom from the vendor by prosecuting the business on his own account; *Palmer v. Graham*, 1 Parsons, 47.

The legal invalidity of the contract, coupled with other circumstances, may afford a ground for the intervention of a chancellor whether real or personal property is in question. It is well settled that when such a case occurs and is a proper one in other respects for equitable relief, the jurisdiction will not fail because the subject matter is a chattel. It may arise from the part performance of an antenuptial agreement, touching the wife's chattels or choses in action which is not reduced to writing, in conformity with the statute of frauds; *Gough v. Crane*, 3 Maryland Ch. 119; 4 Maryland, 313. So equity will always afford relief against a breach of trust; and a bank which lends money to a trustee on the faith of stock standing in his name, but belonging to the *cestui que trust*, may be compelled to transfer it at the instance of the latter, unless the advance was made in good faith and without notice; *The Mechanic's Bank v. Seton*, 1 Peters, 209. In general, chancery will not afford redress for the detention, or as-

portation of a chattel. But an exception may be made when the wrong is a betrayal of confidence; and in *M'Gowan v. Remington*, 2 Jones, 56, a clerk was compelled to surrender draughts, maps, plans, &c., which he withheld from his employer. In like manner, a husband may be compelled to surrender bonds, notes and other documentary evidence belonging to the estate of his deceased wife to her personal representatives, where such relief is essential to the ends of justice; *Gough v. Crane*. So one who borrows the certificates of stock and bonds belonging to the estate of a decedent from the executor, is under an obligation to make restitution which chancery may enforce specifically; *Abbots' Ex'r v. Reeves*, 13 Wright, 494.]

The jurisdiction of equity to compel a specific performance, was carefully considered in *Chamberlaine v. Blue*, 6 Blackford, 491, 492, where the court held the following language: "As a general rule, a court of chancery will not interfere where a contract sounds only in damages. There are cases, however, where on contracts sounding in damages only, a court of chancery will exercise its jurisdiction. As, for example, where there was a contract for the sale of a large quantity of iron, to be paid for in a certain number of years by instalments, a specific performance was decreed; 3 Atk. 384; *Adderly v. Dixon*, 1 Sim. & Stu. 607. And in *Buxton v. Lister*, 8 Atk. 383, which was a bill for the specific performance of a con-

tract for the delivery of certain timber at specified periods, Lord Hardwicke held that a court of equity could grant relief in such a case, though in that case the bill was dismissed on account of fraud in the vendor. The exercise of this jurisdiction, however, is limited to cases where a compensation in damages would not afford a full, complete, and satisfactory remedy. Courts of equity will also, in many cases, decree the specific execution of personal contracts, where injury is apprehended but not yet sustained." In that case, it was held that a court of equity may decree specific performance of a general covenant to indemnify; but an opposite decision was given in *Hoy v. Handsborough et al.*, 1 Freeman's Chancery, 533.

In *Phillips v. Berger*, 2 Barbour's S. Ct. 609—affirmed 8 Id. 527—it was determined that a bill could be sustained for a specific performance of an agreement to compromise a judgment debt, by receiving a promissory note of a third person for a portion of the amount. And Edmonds, J., in that case, said: "The jurisdiction of this court, in compelling a specific performance of contracts relating to lands, is pretty well settled; but not so in regard to personal contracts—that is, contracts for personal acts, or for the sale and delivery of personal property. The reason for the distinction between the two classes of contracts has long since passed away. Yet, the distinction, still, in a great measure, remains. Judge Story, with great propriety, in his Com-

mentaries on equity jurisprudence, remarks, that there is no reasonable objection to allowing the party who is injured by the breach to have an election either to take damages at law, or to have a specific performance in equity. The courts have not yet gone that length; but when they do, they will relieve the subject of specific performance of many of its embarrassments, and remove from this branch of equity jurisprudence many of the artificial distinctions to which the courts have been compelled to have recourse, in order to justify their advance toward such a sound general rule. The rule in regard to personal contracts yet falls short of that, and is extended only to cases where the party wants the thing in specie, and he cannot otherwise be compensated; that is, where an award of damages would not put him in a situation as beneficial as if the agreement were specifically performed. Or, where the compensation in damages would fall short of the redress which his situation might require. The general rule is, not to entertain jurisdiction to decree a specific performance respecting goods, chattels, stocks, *choses in action*, and other things of a mere personal nature; but the rule is qualified, and is limited to cases where a compensation in damages would furnish a complete and satisfactory remedy."

[Similar ground was taken in *Very v. Levy*, 13 Howard, 345, and an agreement by a creditor to receive such goods as he might select, in payment of the debt, under

which part of the goods had been delivered, carried into execution by a decree that a master should select and deliver the residue of the goods in final satisfaction, in case the creditor refused to select them himself; the court holding that although an accord is not binding, at law, without satisfaction, it may yet be specifically enforced by equity. Another instance may be found in *Kirksey v. Fike*, 27 Ala. 283, where an award dividing vats and hides, which formed the assets of a partnership, equally between the partners, was enforced specifically on the ground that the principle was the same whether lands or chattels were in question, and that a specific performance should be decreed where compensation in damages would manifestly be inadequate. It seems, moreover, to have been thought in this case, and in *Clark v. Flint*, 22 Pick. 231, that the insolvency of a party who withholds a chattel, may be a reason why equity should decree its restitution, instead of remitting the complainant to an action at law. And where A. and B. agreed that A. should furnish a large number of peach trees, and that B. should plant them on his farm, send the fruit to market, and render an account of the profits, and A. furnished the trees in pursuance of the contract, equity enforced the agreement specifically at the suit of A. and those claiming under him, by assignment; *M'Knight v. Robbins*, 229, 642: see *Fish v. Johnson*, 2 Jones' Eq. 149.

Where a trust has been created,

in relation to particular chattels, by contract, there is no doubt that a bill in equity will lie to enforce the trust, and have a transfer of the property; *Ferguson v. Paschell*, 11 Missouri, 267. *Cowles v. Whitman*, 10 Connecticut, 121, 125, was the case of a trust in bank shares; and *Clark v. Flint*, 22 Pickering, 231, 239, rests upon a similar principle. It was there held that, where the owner of a brig had contracted in writing, for a valuable consideration, to hold the vessel in trust for another, and subject to his order and disposition, and had then sold her to another person with notice of the contract, specific performance might be enforced in case of the insolvency of the original contractor, since a judgment at law against an insolvent person would not be an adequate remedy. "It is objected," said Wilde, J., in delivering judgment, "that the court ought not to exercise jurisdiction in equity for a specific performance of agreements relating to personal property. And generally, that rule has been observed in the English courts, but has been subject to numerous exceptions, and has been uniformly limited to cases where a compensation in damages furnishes a clear and adequate remedy. If the party complaining has no such remedy, it is quite immaterial whether the contract relates to real or personal estate: 2 Story on Eq. 24. The exercise of equity jurisdiction does not proceed upon any distinction between real estate and personal estate; but because damages at

law may not in the particular case afford a complete remedy.

"This doctrine is thus laid down by Judge Story in his Commentaries, and is fully sustained by the cases cited in support of it. The reasons given for a distinction between real estate and personal estate are not very satisfactory. All, as it seems to me, that can be fairly inferred from the cases on this point is, that in contracts respecting personal estate a compensation in damages is much oftener a complete and satisfactory remedy, than it is in those which relate to real estate. But in all cases, if the party has not such a remedy, a court of equity will entertain jurisdiction, and grant relief as justice may require."]

In the southern States of this Union, numerous cases have arisen in regard to slaves, who are regarded by the law as property, but in many instances are property of the most specific kind. The discussions which have taken place on this subject are well adapted to discover the true grounds upon which equity enforces, or refuses to enforce a personal contract.

In South Carolina, in the earlier cases, it was held to be a general rule, that Chancery did not enforce specific execution of contracts relating to personal property, and that the circumstance that slaves were the subjects of the contract, did not create an exception: *Farley v. Farley*, 1 M'Cord's Chancery, 506, 516. Subsequently, in the case of *Sarter and Wife and others v.*



Gordon, Adm'r, 2 Hill's Chancery, 121, the considerations which give to domestic slaves a specific character and an individual value, in relation to their owner, were brought fully into view, and it was decided, that, as a general rule, a bill will lie for the specific delivery of slaves, as for the specific performance of a contract for the sale of lands, but that there might be exceptions to the rule, if it appeared that the purchaser contracted for the slaves as merchandise to sell again, this according to the expression in *Buxton v. Lister*, would be merely a matter in the way of trade, and in such a case, complete justice might be done by a compensation in damages. Shortly after, in *Horry and Trapier, Trustees, v. Glover and others*, 1 Id. 515, 525, the rule was laid down as follows: "that if a man's slave has come into the possession of another who refuses to deliver him, or if he has contracted for specific slaves, he has a right to the specific delivery: But if the contrary appears—that he contracted for slaves generally, with no view to any particular individuals, or if they were contracted for as merchandise, to sell again, the remedy is at law." In *Young v. Burton*, 1 M'Mullan's Equity, 256, the subject was again discussed in the Court of Errors, and the reader is specially referred to that case, as containing a thorough and able exposition of the distinctions in relation to the specific execution of personal contracts. The rule was there propounded: "First, that a bill well

lies for the specific delivery of slaves, generally, which are withheld from the possession of the rightful owner. Second, that it is sufficient to give jurisdiction to the court, to state, in such bill, that the slaves are the property of the complainant, and that their possession is withheld by the defendant." See, also, *Bobo v. Grimke & Martin*, Ib. 304, 310; *Fraser v. M'Clennachan*, 2 Richardson's Equity, 79, 84; *Ellis v. Commander*, 1 Strobhart's Equity, 188, 190. In the late case, however, of *Bryan & Richardson v. Robert*, Ib. 335, 341, the limits of equity jurisdiction on this subject were more specially and precisely defined, and the generality of the previous rule, perhaps, somewhat qualified. In that case, a slave had been sold, and a mortgage upon him taken for the purchase-money, and he had again passed through the hands of several vendees; the sureties of the original mortgagor then paid the debt, and took an assignment of the mortgage, and sought to recover the slave. "I think," said Harper, C., "there is a misconception in supposing this a case in which a bill will lie for the specific delivery of a slave. The general principle on which such a bill may be sustained, as determined by the cases of *Sarter v. Gordon*, *Trapier v. Glover*, and *Young v. Burton*, rests on these grounds: that where an owner has had possession of a slave, and he has been deprived of it by the act of another, the general presumption is, that there may be some qualities in the slave which would

render him of more value to the owner than could be compensated by the price of such a slave, estimated at his mere market value. So, where a party contracts for the purchase of specific slaves, it is presumed that he may have made his contract with a view to some particular qualities in the slaves themselves, for which ordinary damages would not be a sufficient compensation. Or, as in *Trapier v. Glover*, when one is entitled to slaves, by the gift or limitation of a friend, relation, or ancestor, there is very sufficient reason why he should have the slaves themselves, instead of any damages for their estimated value. A general expression is used in one of the cases, that where a party states a defendant to be in possession of his slave, he states a case entitling him, *prima facie*, to the interference of this court. And so it is, but it must be taken with the qualifications I have suggested from the context of the cases. An exception is made in the cases, when it appears that, without any view to peculiar qualities, there is a contract for slaves, to be sold again as merchandise.

"The same reason applies, and more strongly, in the case of a mortgagee of slaves. He is not supposed to know anything of the peculiar qualities of the slaves, except that he might form an estimate of the market value of such slaves, and certainly not to have the same attachment, or knowledge of their character and qualifications, as the owner, who has been in possession of them, and has been deprived of

it. In this court, the mortgagee, though having the legal title, is not considered, in any manner, as the owner of the slaves; as, in a court of equity, in England, the mortgagee of land is not considered the owner. He is regarded as having taken a pledge or security for his debt, with no view to the possession of the property itself. His object is merely the recovery of his money."

In Alabama, principles quite the same with those thus defined by Mr. Chancellor Harper, are laid down in *Savery v. Spence*, 13 Alabama, 561, 564, which related to a contract about slaves, which clearly involved pecuniary considerations only. "A court of equity," said Dargan, J., "will not decree a specific execution of a contract in reference to personal property, when compensation for the breach of the contract in damages, furnishes a complete and satisfactory remedy. See 2 Story's Eq. 26. A court of equity will, in some instances, interpose, and decree a specific performance of a contract, in reference to personal property; but then it must be shown, that a court of law cannot give full and complete redress by compensation in damages, for a breach of the contract, either from the nature of the contract itself, or from the peculiar character of the subject-matter of the contract, neither of which is shown in the present case, and therefore, the complainant should be remitted to a court of law, which is fully competent to give redress in this case, if there has been a violation of the terms

of any contract in reference to the slaves."

In Mississippi, in the case of *Murphy v. Clark*, 1 Smedes & Marshall, 221, 232, a bill was filed for the specific delivery of slaves, and the objection to the jurisdiction was urged, that there was an ample and complete remedy at law, and that the bill did "not disclose those circumstances which are necessary to authorize the interposition of equity, or in the technical phrase of the books, the *pretium affectionis* was not set forth." Mr. Justice Clayton, after an examination of the authorities, said, that the cases, to his apprehension, established the principle, "that whenever the bill states circumstances, from which the court may fairly infer that the owner prefers the property in specie to damages, and that this preference is of a character which it is not unreasonable to indulge, and exists in reference to property for which damages at law might not be a full compensation, equity will entertain jurisdiction." The point was not considered as judicially settled by this case, and came up again in *Buller v. Hicks et al.*, 11 Id. 79, 85, where a majority of the court affirmed the principle of *Murphy v. Clark*; but Sharkey, C. J., dissented, or qualified his assent, as to the general principle. "I cannot concur in holding," he said, "that the owner of slaves may, under any and all circumstances, resort to the court of chancery for the recovery of his property. Slaves are regarded as property; the title to property is triable at law, unless there be

some peculiar circumstances to give a court of chancery jurisdiction. I do not think this mere character of the property carries with it, necessarily, the *pretium affectionis*, which has usually been held necessary to give the court of chancery jurisdiction to decree the specific property to the master. A slave, from peculiar abilities or habits, might be worth greatly more to his master than he would be to any other person, and in such cases, the jurisdiction might well be exercised."

The same subject was discussed in an interesting manner, in *Dudley v. Mallery*, 4 Georgia, 52, 65. "His Honor, the presiding judge," said Lumpkin, J., in delivering the opinion of the Supreme Court, in error, "held, in accordance with the recent South Carolina cases, that a bill well lies in a court of equity for the specific delivery of slaves, which are withheld from the possession of the rightful owner, and that it is sufficient to give jurisdiction to the court, to state, in such bills, that the slaves are the property of the complainant, and that their possession is withheld by the defendant.

"We yield our unqualified approval of the motive which has prompted these adjudications, namely, humanity to the slave, the interest of the owner, and a just regard to the ties which bind the master and slave together. Those who are acquainted with this institution, know, that the master and slave form one family, or social compact, being usually reared together on the same lot or

plantation, and feeling toward each other the kindest sympathies of our nature. . . . Instead of weakening, our desire is to maintain and promote this mutual attachment and goodwill. But we cannot, for the very reasons assigned in these cases, go to the extent of holding that it is sufficient merely to allege in the bill, that the slaves sought to be recovered, are the property of the complainant, and withheld by the defendant. In many, I am prepared to say from my own experience, in a majority of the suits instituted for the recovery of slaves, humanity to both races requires that there should not be a *specific delivery*. . . .

"Female slaves are sometimes pledged for the payment of loaned money, and the borrower returns after the lapse of many years, tenders payment and claims the right to redeem his property, which has multiplied to a numerous family; here, as it often happens, the best feelings of our nature are opposed to the legal or equitable right.

"Slaves, then, being by our law, chattels, we think it best, that as a general rule, chancery should not entertain a bill for their specific delivery. And that to give jurisdiction, it is necessary to charge and prove peculiar circumstances—as, that they are family servants, a carpenter, blacksmith, wagoner, hostler, &c. This will give the defendant an opportunity of stating in his answer the peculiar circumstances connected with his possession; and the special jury,

under the direction of the chancellor, will constitute a fit and proper tribunal, to pass upon the peculiar features of each case, and to decree either a specific delivery of the property, or its equivalent in money.

"And this is in conformity with the practice of the English courts, from which ours is derived. There, a bill will not lie for the specific recovery of chattels, unless where the remedy at law by damages, would be utterly inadequate, and leave the injured party in a state of irremediable loss. In all such cases, courts of equity will interfere, and grant full relief by requiring a specific delivery of the thing which is wrongfully withheld; 2 Stor. Eq. Jur. § 709.

"Thus, where the lord of the manor was entitled to an old altar piece, made of silver, and remarkable for a Greek inscription, and dedication to Hercules, it was decreed to be delivered up as a matter of curious antiquity which could not be replaced in value; *Somerset v. Cookson*, 3 P. Wms. 390. So, where an estate was held by the tenure of a horn, and a bill was brought to have it delivered up, it was held maintainable; for it constituted an essential muniment of his title; *Pusey v. Pusey*, 1 Vernon, 273. The same principle applies to any other chattel, whose principal value consists in its antiquity; or in its being the production of some distinguished artist; or in being a family relic or ornament, or heir-loom; such, for instance, as ancient gems, medals, and coins; ancient stat-

utes and busts; paintings of old and distinguished masters; and even those of modern date, having a peculiar distinction and value, such as family pictures and portraits and ornaments, and other things of a kindred nature."

In North Carolina, in the case of *Williams v. Howard*, 3 Murphy, 74, 80, 81, though the point was not considered as necessarily arising, the judges expressed their opinions upon it. "I have no hesitation in giving it as my decided opinion," said Taylor, C. J., "that the reason of the rule in relation to the specific execution of contracts relating to chattels, does not apply to slaves; that they form an exception, for reasons equally cogent, or more so, than those applicable to land. With respect to other chattel property, justice may be done at law, by damages for non-performance, and therefore equity will not interpose: but for a faithful or family slave, endeared by a long course of service or early association, no damages can compensate; for there is no standard by which the price of affection can be adjusted, and no scale to graduate the feelings of the heart." "All the principles," said Henderson, J., in the same case, "which induce a court of equity to compel the specific execution of a contract for the sale of lands, or some favorite personal chattel, apply with equal, if not stronger force to the case of slaves." These principles have been applied in a number of other instances, and are generally recognized in the southern States of

the Union; *Pasley v. Martin*, 5 Richardson's Equity, 351; *Reese v. Holmes*, Ib. 531; *Leftin v. Erspy*, 4 Yerger, 84, 92; *Henderson v. Vaux*, 10 Id. 30, 37; *Summers v. Bean*, 13 Grattan, 404.

[Equity may compel the execution of an award, where its own nature, or that of the subject-matter to which it relates, is such that it cannot be carried into execution unless some act is done by one or both of the parties, which could not be enforced in a court of law; as when the title to land is in question, and the arbitrators decide that the title is in one of the parties, or that the other shall execute a release or conveyance; *Wood v. Shepherd*, 4 Patton & Heath, 442; *M'Neill v. Magee*, 5 Mason, 245; *Somerville v. Freeman*, 4 Harris & M'Henry, 45; *Jones v. The Boston Mill Corporation*, 4 Pick. 507; *Davis v. Howard*, 15 S. & R. 165, 171; 2 Smith's Leading Cases, 651; or where the award is for the delivery of specific chattels, and the case is one in which no adequate remedy could be had by a suit for damages; *Kirksey v. Fike*, 27 Ala. 383; *Story v. The Railroad*, 24 Conn. 94; and, in general, whenever the circumstances are such that equity would lend its aid, if the obligation grew out of contract, and not from an award. Hence, when an award is legally invalid or ineffectual, in consequence of some mistake or omission, which is not substantial, equity will intervene and enforce its execution; *Bouck v. Wilber*,

4 Johnson's Chancery, 405; *Bays v. Eberhardt*, 3 Michigan, 544; *Cook v. Vich*, 2 Howard, 882.

Equity will not enforce an agreement to refer existing disputes to arbitrators; *Conner v. Drake*, 1 Ohio, N. S. 166; *King v. Howard*, 27 Missouri, 21; *Tobey v. County of Bristol*, 3 Story, 800, 820, 823; because such an agreement is, in effect, a mere power, and consequently revocable, and because the policy of the law will not permit the courts to be ousted of their jurisdiction; *Toby v. Bristol*, 3 Story's Equity, sect. 1457. These reasons are somewhat questionable, a power coupled with an interest being irrevocable; 1 American Leading Cases, 578; 2 Id. 738; and legal policy no longer forbidding an agreement to substitute a tribunal chosen by the parties for that provided by the legislature or constitution; *Livingston v. Rolle*, 5 Ellis & Blackburn, 132: and in *M'Gheehen v. Duffield*, 5 Barr, 497, the court went on the principle, that when a countermand of a submission would be inequitable, equity will uphold and enforce the award. See *Greason v. Keteltas*, 17 New York, 491; *City of Providence v. St. John's Lodge*, 2 Rhode Island, 461; *Dike v. Green*, 4 Id. 285; *Hopkins v. Gilman*, 22 Wisconsin, 476.

It has been held that an agreement to sell or lease at a price or rent to be fixed by a third person, partakes of the nature of an agreement of reference, and will not be specifically enforced; *Hopkins v.*

Gilman; *Milner v. Grey*, 14 Vesey, 400.

There are many contracts which cannot be made the subject of a decree for specific performance, because it would be difficult or impracticable to carry the decree into effect, without an inquisitorial and oppressive exercise of authority. Hence an engagement to sing or act at the theatre, or other place of public amusement, will not be enforced, because it would answer no good end to bring the performer on the stage, unless he could also be compelled to play his part or use his voice with effect when there; *Sanquirico v. Benedetti*, 1 Barbour, 365. The same reason applies to most other agreements for personal acts or services; *Haight v. Badgely*, 15 Id. 501; *De Rivafenoli v. Corsetti*, 4 Paige, 421; *Hamblin v. Denneford*, 2 Edwards, 522; *Palmer v. Scott*, 10 Russell & Mylne, 391. In *Lumley v. Wagner*, 1 De Gex, M. & G. 604, a singer was enjoined from appearing elsewhere during the engagement which he had violated; but this decision has not been followed in the United States. It is a general rule that when the duties imposed by a contract are continuing, and require care and skill, equity will not compel a specific performance from the difficulty of enforcing the decree; *The Marble Company v. Ripley*, 10 Wallace, 340; *The Port Clinton R. R. Co. v. The Toledo R. R. Co.*, 13 Ohio, N. S. 544. In *The Marble Co. v. Ripley*, a contract to deliver marble of various kinds, and in blocks of a certain kind, so that the court

could not know whether any decree that might be made was fulfilled, without employing an expert to superintend the execution of the contract, was held to be within this principle. In *The Port Clinton R. R. Co. v. The Toledo R. R. Co.*, an agreement between two railway companies, by which one undertook to construct a railroad, and the other to run it, was held not to be a fit subject for a decree of specific performance; and like decisions were pronounced in *Fallon v. The R. R. Co.*, 1 Dillon C. C. 121, and *Russ v. The Union Pacific R. R. Co.*, 1 Woolworth C. C. 26.

The rule applies conversely, and a chancellor will not compel the respondent to accept and pay for a service which it would not direct the complainant to perform, not so much from the want of mutuality as because every decree of specific performance implies that the contract is to be executed on both sides. The court will not take cognizance of any part of the subject matter unless it can embrace the whole. Whether a continuing contract to manufacture and deliver goods of a certain kind is sought to be enforced by the vendor or the purchaser, the difficulty of ascertaining whether the goods correspond with the terms of the contract, is the same, and constitutes an insuperable obstacle. See *The Marble Co. v. Ripley*. For a like reason a principal will not be compelled to accept and pay for services requiring skill, fidelity, and attention; *Johnson v. The S. & B. Railway Co.*,

3 De G. M. & G. 914. A decree that a manager should accept and pay for the services of an actor, would be attended with the same risk of injustice, as if the actor were ordered to play for the manager, because the actor might go through his part without the spirit requisite to attract an audience.

It seems that a chancellor may, in the exercise of a sound discretion, decree the specific execution of a contract to erect a building on the land of the complainant, or to open a drain through that of the defendant, although such a jurisdiction will not be exercised, except on special grounds, and under peculiar circumstances, when the legal remedy is inadequate. See *Stuyvesant v. The Mayor of New York*, 11 Paige, 414; *Stour v. The Great Western Railway Co.*, 2 Younge & Collier, 48; *Birchett v. Bolling*, 5 Mumford, 442; *Whitney v. New Haven*, 23 Conn. 624.

It is held that chancery may, under some circumstances, enforce the specific performance of an agreement for the formation or continuance of a partnership; *Story's Eq. Jurisprudence*, § 722; *Wilson v. Campbell*, 5 Gilman, 383; but the power is open to many objections, and certainly will not be put forth in any case when its exercise would be inequitable, or where a sufficient remedy could be had at law; *Wadsworth v. Manning*, 4 Maryland, 59; *Reid v. Vidal*, 5 Richardson's Equity, 289. Nor will equity, in general, compel parties who have agreed to

take the stock of a railroad, to fulfil their engagement, but will leave the company to their remedy in damages at law; *The Strasburgh Railroad Co. v. Echternacht*, 9 Harris, 220: although, where a complainant had subscribed for stock, on the faith of a promise by the defendants to take half the shares when issued, he was held entitled to a decree for specific performance; *Austin v. Gillespie*, 1 Jones' Equity, 261.

The rule that equity will not enforce contracts relating to chattels or other personal property, specifically, ceases to be applicable when the complainant stipulated expressly or by implication for a specific interest in the nature of a lien or security, and when the object which he had in view, consequently, cannot be attained by remitting him to an action *in personam* for damages, without a guaranty for the payment of the amount recovered. Hence, nothing is better settled than that contracts for the specific appropriation of a fund or chattel, in payment or as security for a debt, will be viewed in equity as actual assignments and not as mere promises to assign, and specifically enforced as such between the contracting parties and those claiming under them as creditors or purchasers; *Sullivan v. Bowie*, 1 Maryland Ch. 59; *Trebert v. Burgess*, 11 Maryland, 452. The rule was so held in *Shockley v. Davis*, 17 Georgia, 177; *Buck v. Swazey*, 35 Maine, 41; *Alexander v. Ghiselin*, 5 Gill, 138; and *Trebert v. Burgess*, 11 Maryland, 452, 464; and has

been applied in a number of other instances, many of which will be found collected in the note to *Rowe v. Dawson*, *post*, vol. 2, part 2d. In like manner, when a grant or mortgage is made of freight which has not yet been earned, or of goods and chattels before they are acquired, equity will view the transaction as a contract, and give it effect by a decree for specific performance; *Mitchell v. Winslow*, 2 Story, 630; because there is no adequate remedy at law, and the plain intent of the transaction would fail without the assistance of chancery. Equity will, moreover, intervene whenever its aid is necessary to give effect to the assignment of a contract or *chose in action*, because contracts of that nature cannot be made the subject of a legal transfer, and consequently fall more peculiarly within the jurisdiction of chancery; *Woodward v. Aspinwall*, 3 Sanford's S. Ct. 272; *Field v. The Mayor of New York*, 2 Selden, 179; and the same course will be adopted when a contract has resulted in the creation of an equitable lien; *Ash v. Johnson*, 2 Jones' Equity, 149.

Equity will not, under ordinary circumstances, interfere to compel the performance of an accord while still executory, or which has not been so far executed as to be binding in law as a satisfaction, even when it takes the form of an agreement by a number of creditors, to receive part of the debt in payment of the whole; *Acker v. Phœnix*, 4 Paige, 305. When, however, an accord has been so far

executed by one party that it would be inequitable to permit the other to defeat it by a refusal to accept the performance of the residue, chancery may give the whole effect by a decree for specific performance; *Very v. Levy*, 13 Howard, 145.]

*PUSEY v. PUSEY.

[*820]

DE TERM. S. MICH. NOVEMBER 20, 1684.

REPORTED 1 VERN. 273.¹

SPECIFIC DELIVERY UP OF CHATTELS.]—*Land held by the tenure of a horn. Bill brought by the heir for the horn.*

BILL was, that a horn, which, time out of mind, had gone along with the plaintiff's estate, and was delivered to his ancestors in ancient time to hold their land by, might be delivered to him; upon which horn was this inscription, viz., *pecote this horne to hold huy thy land.*²

The defendant answered as to part, and demurred as to the other part; and the demurrer was, that the plaintiff did not by his bill pretend to be entitled to this *horn* either as executor or devisee; nor had he in his bill charged it to be an *heir-loome*.

The demurrer was overruled, because the defendant had not fully answered all the particular charges in the bill, and was ordered to pay costs. And the LORD KEEPER GUILFORD was of opinion, that if the land was held by the tenure of a *horn* or *cornage*, the heir would be well entitled to the horn at law. *Vide* 1 Inst. 107 a.

¹ Reg. Lib. 1684, B., fol. 310.

² Camden, speaking of the manor of Pusey, says, "the family of Pusey still hold it by a horn, anciently given to their ancestors by Canute, the Danish king." (Camd. Brit. Berks. p. 203, ed. 1607.) Dr. Hicks gives the inscription as follows (see Thes. Præf. p. xxv.) :—

"I Kyng Knowd geve Wylyam Pecote
Thys horne to hold by thy lond."

The name "Pecote," however, seems to be a mistake, and should be written "Pewse." The real inscription runs thus—

Kyng Knowd geve Wylyam Pewse

This horne to hold by thy lond."—Archæologia, vol. 8, p. 13, 14.

[*821] *DUKE OF SOMERSET *v.* COOKSON.

DE TERM. S. MICH. 1785.

REPORTED 3 P. WMS. 389.¹

SPECIFIC DELIVERY UP OF CHATTELS.]—*A bill lies to compel the delivery of an altar-piece, or other curiosity, in specie.*

THE Duke of Somerset, as lord of the manor of Corbridge, in Northumberland (part of the estate of the Piercys, late earls of Northumberland), was entitled to an old altar-piece made of silver, remarkable for a Greek inscription, and dedication to Hercules. His Grace became entitled to it as treasure-trove within his said manor.

This altar-piece had been sold by one who had got the possession of it, to the defendant, a goldsmith at Newcastle, but who had notice of the duke's claim thereto.

The duke brought in a bill in equity, to compel the delivery of this altar-piece *in specie undefaced*.

The defendant demurred as to part of the bill, for that the plaintiff had his remedy at law, by an action of trover or detinue, and ought not to bring his bill in equity; that it was true for writings savouring of the realty a bill would lie, but not for anything merely personal² any more than it would lie for a horse or cow. So a bill might lie for an heir-loom, as in the case of *Pusey v. Pusey*, 1 Vern. 273; and, though in trover the plaintiff could have only damages, yet in detinue, the thing itself, if it can be found, is to be recovered; and if such bills as the present were to be allowed, half the actions of trover would be turned into bills in Chancery.

On the other side, it was urged, that the thing here sued for, was matter of curiosity and antiquity; and though at law, only [*822] the intrinsic value is to be recovered, yet it *would be very hard that one who comes by such a piece of antiquity by wrong, or it may be as a trespasser, should have it in his power to keep the thing, paying only the intrinsic value of it: which is like a trespasser's forcing the right owner to part with a curiosity or matter of antiquity, or ornament, nolens volens. Besides, the bill is to prevent the defendant from defacing the altar piece, which is one way of depreciating it; and the defacing may be with an intention that it may not be known, by taking out or erasing some of the marks and figures of it; and though the answer had denied the defacing of the altar-piece, yet such answer could not help the demurrer; that in itself, nothing can

¹ 3 Eq. Ca. Abr. 164, pl. 28.

² Cud. v. Rutter, 1 P. Wms. 570; ante, p. 640, nom. Cuddee v. Rutter; Colt v. Netterville, 3 P. Wms. 804.

be more reasonable than that the man who by wrong detains my property, should be compelled to restore it to me again *in specie*; and the law being defective in this particular, such defect is properly supplied in equity.

Wherefore it was prayed that the demurrer might be overruled, and it was overruled accordingly [by Lord Chancellor Talbot].

Since the decision in the cases of *Pusey v. Pusey*, and *The Duke of Somerset v. Cookson*, it has always been admitted, as undoubtedly within the jurisdiction of a court of equity, specifically to compel the delivery up of heir-looms, or chattels of *peculiar value* to the owner, although the heir-looms or chattels, if they could be found, might be recovered in an action of detinue, or their value in an action of trover. The ground of the jurisdiction is the same as that upon which the specific performance of an agreement is enforced—viz., that the specific thing is the object, and damages will not afford an adequate compensation.

“The Pusey horn, the patera of the Duke of Somerset, were things of that sort of value that a jury might not give twopence beyond the weight. It was not to be cast to the estimation of people who have not those feelings. In all cases where the object of the suit is not liable to a compensation by damages, it would be strange if the law of this country did not afford any remedy. It would be great injustice if an individual cannot have his property without being liable to the estimate of *people who have not his feelings upon it.”—Per Lord Loughborough, C., in *Fells v. Reed*, 3 Ves. 71. In *Saville v. Tankred*, 1 Ves. 101, Belt’s Suppl. 70, upon a bill being filed by the representative of a Mr. Saville, the pawnee of a strong-box containing jewels, Lord Hardwicke ordered it to be delivered up to him, although it was objected that the representative of the Duke of Devonshire, to whom it belonged, ought to have been made a party. “The pawnee of a pledge,” observed his Lordship, “as Saville was, may bring trover or detinue at law for it, without troubling himself with the pawner, for he has a special property. But suppose he was not pawnee, but had only the possession of them, and delivered them to another, that person has nothing to do with the duke. Therefore, let these jewels come into his hands which way they will, he may give the custody of them to any one, and have them back without hurting the duke or his representatives:” and see *Lloyd v. Loaring*, 6 Ves. 773; *Pearne v. Lisle*, Amb. 77; *Nutbrown v. Thornton*, 10 Ves. 163; *Arundell v. Phipps*, 10 Ves. 139; *Lowther v. Lowther*, 13 Ves. 95; *Falcke v. Gray*, 4 Drew. 651. In *Earl of Macclesfield v. Davis* 2, V. & B. 16, where a bill was filed for the delivery up of an iron chest, containing certain articles said to be heir-looms, Lord Eldon, said “It is now too late, since the case of

Fells v. Reed, following the case of *Pusey v. Pusey*, to discuss whether this Court will interfere for the specific delivery of a chattel; and if it will in such case a fortiori the restitution of heir-looms must be decreed, upon which there never was any doubt."

But a court of equity will not decree the specific delivery up of a chattel where adequate damages can be ascertained and the payment thereof enforced by an action at law. Thus, although the Court has jurisdiction to order the delivery up to an artist of a picture painted by himself as having a special value, the legal remedy being inadequate, nevertheless where by the terms of an agreement and the frame of the pleadings, the plaintiff, an artist seeking restitution of a picture, had in effect put a fixed price upon it, it was held that damages would be an adequate remedy, and that there was no jurisdiction in a court of equity to interfere. *Dowling v. Betjemann*, 2 J. & H. 544.

And it seems now that the interposition of courts of equity will not be confined to those cases in which the articles sought are of some peculiar or intrinsic value, if there subsist any fiduciary relation between the parties. Thus, in *Wood v. Rowcliffe*, 3 Hare, 304, where a bill had been filed against an agent for the delivery up of furniture and household effects, deposited by the plaintiff with him, and to restrain him from parting with them, as he threatened to do, it was argued for [*824] the defendant, who demurred for want of equity, that household furniture and effects were not chattels of such a peculiar or valuable nature as to be within the rule, and that all the cases in which the specific delivery up of chattels had been decreed were put upon their peculiar and valuable nature, as the horn in *Pusey v. Pusey*, the tobacco-box of the club in *Fells v. Reed*, the patera in *The Duke of Somerset v. Cookson*, the box of jewels in *Saville v. Tankred*, and the heir-looms in *The Earl of Macclesfield v. Davis*,—all being articles of curiosity, antiquity, or hereditary estimation, which, as observed by Lord Eldon, in the case of *Nutbrown v. Thornton*, turned upon the pretium affectionis; and that the same considerations arose in *Lady Arundell v. Phipps*, where the injunction was granted to protect ancient family pictures, chattels, which Lord Eldon described as being "of a very special and peculiar kind." Sir J. Wigram, V. C., however, overruled the demurrer. "I have not," observed his Honor, "the slightest doubt that the plaintiff is entitled to the protection of the Court against the wrongful act which is threatened by his agent. I have known many bills to have been filed in the Court of Exchequer formerly, on behalf of the owners of cargoes, to prevent improper dealings with the goods by their agents, or persons in the situation of agents. The right to be protected in the use or beneficial enjoyment of property *in specie* is not confined to articles possessing any peculiar or intrinsic value." Lord Cottenham, upon appeal, approved of the law on this subject, as laid down by the Vice-Chancellor. "The cases," observed his Lordship,

" which have been referred to, are not the only class of cases in which this Court will entertain a suit for delivery up of specific chattels. For where a fiduciary relation subsists between the parties, whether it be the case of an agent, or a trustee, or a broker, or whether the subject-matter be stock, or cargoes, or chattels of whatever description, the Court will interfere to prevent a sale, either by the party intrusted with the goods, or by a person claiming under him, through an alleged abuse of power;" 2 Ph. 383. And see *Lingen v. Simpson*, 1 S. & S. 600; *Pooley v. Budd*, 14 Beav. 34; *Pollard v. Clayton*, 1 K. & J. 462; *Edwards v. Clay*, 28 Beav. 145.

Upon the same principle a court of equity will decree a specific delivery up of deeds or writings to the persons legally entitled to them. See *Brown v. Brown*, 1 Dick. 62; *Armitage v. Wadsworth*, 1 Madd. 192; *Reeves v. Reeves*, 9 Mod. 128; *Tanner v. Wise*, 3 P. Wms. 296; *Harrison v. Southcote*, 1 Atk. 528; *Ford v. Peering*, 1 Ves. jun. 72; *Papillon v. Voice*, 2 *P. Wms. 478; *Duncombe v. Mayer*, 8 Ves. 320; *Knye v. Moore*, 1 S. & S. 61; *Freeman v. Fairlie*, 3 [*825] Mer. 30; *Grey v. Cockeril*, 2 Atk. 114; *The Duchess of Newcastle v. Pelham*, 3 Bro. P. C. 460, Toml. ed.; *Reece v. Trye*, 1 De Gex & Sm. 273; *Lady Beresford v. Driver*, 14 Beav. 387; 16 Beav. 134; Tudor's L. C. Real Prop. p. 75, 2nd ed., and cases there cited. And it has been held that there is nothing in the character or nature of the certificate of registry of a ship which excludes it from the jurisdiction of the Court to decree its delivery as against a party unlawfully detaining it; *Gibson v. Ingo*, 6 Hare, 112.

In *Jackson v. Butler*, 2 Atk. 306, where mortgage deeds, delivered to a person for the purpose of receiving the principal and interest due on the mortgage, had been pawned by him, were decreed to be delivered up by the pawnee, Lord Hardwicke observing, that the plaintiff might have had an action of trover, but then he could only have damages for the detaining, but not the deeds themselves, and therefore he was right in bringing a bill in equity for the recovery of his deeds.

In a suit to recover specific chattels, as, for instance, deeds, it is not necessary, as in trover to prove conversion or resistance to deliver them up when sought to be recovered. This is so at law, but in equity the Court looks at the case made by the defendant; it is not necessary to apply to a defendant before a suit is instituted; but if the defendant says, 'if you had applied to me, I should not have contested your claim,' then, undoubtedly, he gets the costs of it; but if it appears that an application would have been useless, and that the defendant resists at the hearing, the Court looks at the case exactly in the same point of view as if that right had been insisted upon before the bill had been filed." Per Sir John Romilly, M. R., in *Turner v. Letts*, 20 Beav. 191.

The courts of common law have now, under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), after judgment in an action of

detinue, the same jurisdiction to compel the return of a chattel as the Court of Chancery, but the latter court may enforce its decrees by attachment, whilst the courts of common law can only enforce restitution under the 78th section of the Act, by distringas. Day's Common Law Procedure Acts, p. 274, 3rd ed.

As to the measure of damages at common law for the non-delivery of a chattel according to contract, see *Cory v. The Thames Iron Works and Ship-Building Company, Limited*, 3 L. R. Q. B. 181.

In *M'Gowin v. Remington*, 2 Jones, 56, (12 Penn. R.,) a decree was made for the restitution of the furniture and contents of the complainant's office, including instruments, maps, plans, and surveys, used or prepared by him in the course of his business, as a surveyor, which had been taken, and were withheld from him by a clerk in his employment, while he was absent from the city on business; and Bell, J., who delivered the judgment of the court, held the following language in the course of his opinion: "The defendant having failed to sustain, by proof, his allegation of sale or gift of the articles sought to be recovered by this bill, the contest in this court is reduced to two questions: first, whether the bill presents sufficient grounds to warrant the interference of a court of equity, in this state, under the statute conferring equitable jurisdiction? Secondly, whether that portion of the decree which covers the surveying instruments and furniture, described in the exhibits annexed to the bill, can be sustained?"

"As to the first point: the defendant insists that the only remedy is at law. Though the action of replevin is, with us, a broader

remedy than in England, lying in all cases where one man improperly detains the goods of another, it is in no instance effective to enforce a specific return of chattels, since a claim of property and bond given is always sufficient to defeat reclamation, no matter what may be the eventual issue of the contest. As, therefore, our common-law tribunals are as powerless for such a purpose, as the similar English courts, the propriety of exerting the equitable jurisdiction now invoked, must depend with us on the same reasons that are deemed sufficient to call it into action there. Here, as there, the inquiry must be, whether the law affords adequate redress by a compensation in damages, where the complaint is of the detention of personal chattels. If not, the aid of a court of chancery will always be extended to remedy the injury, by decreeing a return of the thing itself.

"The precise ground of this jurisdiction is said to be the same as that upon which the specific performance of an agreement is enforced, namely, that fruition of the thing, the subject of the agreement, is the object, the failure of which would be but ill supplied

by an award of damages; *Lowther v. Lowther*, 13 Ves. 389. In the application of this rule some difficulty has been experienced. The examples afforded by the English books are usually those cases, where, from the nature of the thing sought after, its antiquity, or because of some peculiarity connected with it, it cannot easily, or at all, be replaced. Of these may be instanced, the title-deeds of an estate and other muniments of property; valuable paintings; *Lowther v. Lowther*, supra; an antique silver altar-piece; *Duke of Somerset v. Cookson*, 3 P. Wms. 389; an ancient horn, the symbol of tenure, by which an estate is held; *Pusey v. Pusey*, 1 Ves. 273; heir-looms; 3 Ves. & B. 18; and even a finely carved cherry-stone; *Ambler*, 77. Such articles as these are commonly esteemed not altogether, or perhaps at all, for their intrinsic value, but as being objects of attachment or curiosity, and, therefore, not to be measured in damages by a jury, who cannot enter into the feelings of the owner; so, too, the impossibility, or even great difficulty of supplying their loss, may put damages out of the question as a medium of redress. But these are not the exclusive reasons why chancery interferes, for there may be cases in which the thing sought to be recovered is susceptible of reproduction or substitution, and yet where damages could not be so estimated as to cover present loss or compensate its future consequent inconvenience. And I take it this is always so, where, from the nature

of the subject or the immediate object of the parties, no convenient measure of damages can be ascertained; or, where nothing could answer the justice of the case but the performance of a contract in specie. Of this *Buxton v. Lister*, 3 Atk. 384, furnishes an example in the analogous instance of a contract for the sale of personalty: contracts, which are most commonly left to be dealt with at law. It was a bill to enforce the performance of an agreement for the purchase of several large parcels of growing wood, to be severed by the defendants, who were to have eight years to dispose of it and to pay for it, in six yearly instalments. Lord Hardwicke was, at first, extremely reluctant to entertain the bill, but after discussion came to the conclusion, that, though relating to a personal chattel, it was such an agreement that the plaintiff might come into chancery for a specific performance. He instanced the case of *Taylor v. Neville*, which was a bill for the performance of articles for the sale of eight hundred tons of iron, to be paid for in a certain number of years, by instalments, where the decree prayed for was made; and proceeded to observe—'such sorts of contracts as these, differ from those that are immediately to be executed. There are several circumstances which may concur. A man may contract for the purchase of a great quantity of timber, as a ship-carpenter, by reason of the vicinity of the timber; and this is on the part of the buyer. On the part of the seller, suppose

a man wants to clear his land in order to turn it to a particular sort of husbandry; there nothing can answer the justice of the case but the performance of the contract in specie.' Similar in principle is the case of *Falls v. Reid*, 13 Ves. 70, where the plaintiffs prayed the restoration of an engraved silver snuff-box, used for many years by a society, as the symbol of their association; and *Nutbrown v. Thomson*, where a tenant brought a bill against his lessor, who, under pretence of the tenant's covenant, had repossessed himself of the land, and seized upon the stock of cattle, which by the lease the tenant was to enjoy for seven years. The objection was that the tenant's remedy, if he was entitled to one at all, was at law, in damages. But how, asked Lord Eldon, are damages to be estimated in such a case? The direction to a jury must be to give, not the value of the chattels, but their value to the tenant! A similar question may well be propounded in our case. By what standard would you measure the injury the plaintiff may sustain *in futuro* from being deprived, even for a brief period, of the use of papers essential to the prosecution of his business? Their intrinsic value might, perhaps, be ascertained by an estimate of the labor necessary to their reproduction, admitting the means to be at hand, and within the power of the plaintiff. But how could a tribunal ascertain the probable loss which, in the meantime, might be sustained? The present pecuniary injury might be

little or nothing, and so possibly of the future; or it might be very great, depending upon the uncertainable events of coming time, as these may be influenced by the misconduct of the defendant. These considerations show, I think, the case is not one for damages. Besides, as many of the maps, plans, surveys, and calculations are said to be copies of private papers, we are by no means satisfied they could be replaced at all. Certainly not without permission of the owners; a risk to which the plaintiff ought not unnecessarily to be exposed. If to these reflections we add the fact that some of these documents are the original work of the plaintiff, of value as being predicated upon data possibly no longer accessible, a wrong is perpetrated which a chancellor ought not to hesitate in relieving. It is enough for this purpose, that a perfect relief at law is not apparent. The thing to be guarded against is, not the invasion of the defendant's rights, for he stands here absolutely without any, except the common interest every citizen has in preserving the proper line of distinction that divides the jurisdiction and limits the powers of the several courts. What is to be avoided is an unnecessary trespass upon the province of the common law tribunals, and this is to be tested by the simple query whether they offer a full remedy for the wrong complained of?

"But there is another ground upon which this proceeding may be sustained. In *Falls v. Reid*, the snuff-box was deposited with

the defendant, as a member of the society, upon certain terms, to be redelivered upon the happening of certain events. Lord Rosslyn held that under these facts, the defendant was a depositary on an express trust which, upon a common ground of equity, gave the plaintiff title to sue in that court; and in this he was supported by Lord Eldon, in the subsequent case of *Nulbrow v. Thornlon*. According to the proof in our case, the papers and documents claimed were left with the defendant under the express understanding that they were to be redelivered whenever the plaintiff should see fit to resume the business of his then profession in this city. It is then the case of direct confidence violated—a spell sufficiently potent to call into vigorous activity the authority invoked.

“As to the second question, it is perhaps enough to say, that when once a court of equity takes cognizance of a litigation, it will dispose of every subject embraced within the circle of contest, whether the question be of remedy or of distinct yet connected topics of dispute. If the jurisdiction once

attaches from the nature of one of the subjects of contest, it may embrace all of them, for equity abhors multiplicity of suits. Thus in the case last cited, the chancellor ruled that where a person is found wrongfully in possession of a farm, over which the court had undoubted power, and also in possession of the stock upon it, at the same time and under the effect of the same wrong, the court will undoubtedly make him account for and deliver back the whole. In the case at bar the surveying instruments and office furniture stand in the same category with the maps, drafts, &c.; were delivered to the defendant at the same time, and are withheld by an exertion of the same wrong. In short, they enter into and make part of the same transaction, and may, therefore, be the objects of the same measure of redress.”

It is a general rule that where a written obligation is invalidated by fraud, mistake, or other like cause, a court of equity may direct that it shall be delivered up and cancelled; *Wilson v. Getty*, 7 P. F. Smith, 266; *Simes v. Everson*, 10 Wright, 304.

[*826]

*FLETCHER v. ASHBURNER.

JUNE, 1779.

REPORTED 1 BRO. C. C. 497.

CONVERSION.]— *Where a real estate is ordered to be sold, it becomes personalty, and shall go accordingly.*

JOHN FLETCHER, by his will devised his burgage houses and free rents in Kendal, and all his personal estate, to trustees and the survivor, and the heirs, executors, and administrators of such survivor, in trust to sell so much as should be sufficient to pay his debts, and then to permit his wife Agnes to enjoy the residue during her life, if she so long continued his chaste widow, and after her decease, to sell and dispose thereof, and the money arising thereby, after deducting charges, and half-a-guinea each to the trustees for their trouble, to pay to and between his son William and daughter Mary, share and share alike; provided, that if his wife should happen to marry again, the trustees should, immediately after the marriage, sell all the estate and effects given to her for her life, and, after such deductions as aforesaid, should pay the remainder of the money to and amongst his wife, his son William, and daughter Mary, share and share alike, equally; and in case either his son William or his daughter Mary should die before his or their legacy should become due, that the share or legacy of him or her so dying should go to the survivor of them.

The testator died, leaving Agnes his widow, William his only son and heir-at-law, and Mary his daughter.

Agnes, by the custom of burgage tenure, was entitled to hold the burgage houses in Kendal during her chaste viduity, against the disposition of her husband by will.

Mary attained twenty-one, but died unmarried, in the [*827] *life of her mother and brother. William was twenty-one at the death of the testator, and died without issue, in the life of his mother; the mother died the widow of the testator.

Upon her death a bill was filed by the heir-at-law of William and John the testator, against the trustees and the personal representatives of the testator and of the widow, to have a conveyance of the real estates devised by the will to the plaintiff, the heir-at-law.

The representative of the widow, who was the sole next of kin of William, the son, by answer claimed the property as personal; alleging, that, by the direction to the trustees to sell the real estates, they became as personal property, and, as such, were to go to the personal representative of William, the son, who survived his sister.

The cause was heard the 11th December, 1778, where the first objection taken was, that the personal representative of William was not before the Court.

But Sir THOMAS SEWELL, M. R., was of opinion there were sufficient parties to sustain the question; that the personal representative was a mere formal party; and that, if he thought proper to make a decree, a personal representative might be brought before the Master.

Mr. *Madocks* and Mr. *Wilson* further argued, with respect to the principal question, that the real estates devised by the will were still to be considered as real estates, and to go to the real, not the personal, representative; that it was clear the intention of the testator that the estate should remain, and, whilst, it did so, was to be enjoyed by one person; and he directed it to be sold merely for the purpose of a division; that, in consequence of the death of the daughter no division was to be made, and therefore the reason for the directions ceased; and, from thenceforth, the son alone becoming entitled, upon the death of his mother, it was to be considered as land. They relied upon the case of *Flanagan v. Flanagan*, 8th June, 1768, before Lord Camden, which was a devise of real and personal estate to trustees in trust, out of the personal estate, and by sale of a sufficient part of the real, to pay debts, the surplus, after [*828] payment of debts to A. A suit was instituted for payment of the debts, and the real estates decreed to be sold; part was sold; and afterwards A. died, leaving a son and daughter; the cause was revived against the son; and it being apprehended that sufficient was not sold to pay the debts, a further part of the real estate was sold under the order of the Court. It afterwards proved that the money produced by the first sale was sufficient to pay the debts; the question was, whether the heir or the personal representative was entitled to this money. It was alleged by Mr. *Wilson*, who cited the case, that Lord Camden's determination was, that whatever quality the fund then had, such it should retain; and he decreed for the personal representative. The other cases mentioned were *Cruse v. Barley and Banson*, 3 P. Wms. 20, and *Digby v. Legard*, before Lord Bathurst.¹

Mr. *Kenyon* and Mr. *Chambre* (on behalf of the defendants, the executors of the widow) contended that the testator had, by his will, directed the real estate, after the death of his widow, to be sold and blended with his personal estate, and the whole to be divided between his children, or in case either of them should die in the life of his wife, to the survivor. Upon the case of *Flanagan v. Flanagan*, it was observed that the Court determined the produce of the real estate to be considered as personal, because the court had itself directed the sale to be made and the property to be changed for payment of debts. The cases of *Digby v. Legard*,

¹ 3 P. Wms. 22, note (1).

and *Cruse v. Barley and Branson*, were treated as inapplicable to the present case, being cases of lapsed devises: *Durour v. Motteux*, 1 Ves. 320,¹ and *Mallabar v. Mallabar*, Forrester, 79, were cited, as decisive of the question in favour of the defendants.

Sir THOMAS SEWELL, M. R., in June, gave his opinion. He observed, that nothing was better established than this principle: [*829] that money directed to be employed in the *purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid, whether the land is actually conveyed, or only agreed to be conveyed, the owner of the fund, or the contracting parties, may make land money or money land. The cases established this rule universally.

If any difficulty has arisen, it has arisen from special circumstances. In the case of *Sweetapple v. Bindon*, 2 Vern. 536, it was determined that a husband was entitled to money to be laid out in land, as tenant by the curtesy: and although it is held that a wife is not entitled to dower in a similar case, yet it is allowed that it is so held, because cases have been determined, and not from any principle. The cases of land to be turned into money are fewer than those of money to be employed in the purchase of land. The principal cases have been where real estates have been directed to be sold, and some part of the disposition has failed; so that something has resulted to the heir-at-law, as in the case of *Emblin v. Freeman*, Prec. Ch. 541, and *Cruse v. Barley and Banson*, 8 P. Wms. 20. These are all cases where a devise has failed, and the thing devised has not accrued to the representative or devisee, but to the heir-at-law of the testator. The case of *Dourour v. Motteux*, 1 Ves. 320, is a strong case to the point now before the Court; and, if anything could strengthen the general rule, the circumstances of the present case would do so. The testator has blended the real and personal estate together, and disposed of them without distinction, for the benefit of his wife and children. Both real and personal estate are made one fund. In the case of *Durour v. Motteux*,¹ Lord Hardwicke made this a principal ground for considering the whole fund as personal estate; in the present case it might be uncertain, till the death of the widow, [*830] whether *the estates must not be absolutely sold; but the children, indeed, died before her: but she might have married before the death of one or both. The interest of both the children were vested, subject, as to one of them, to be defeated in case either of them died before the mother.

¹ See will of Motteux correctly stated, 1 S. & S. 292, note (d).

² 1 Ves. 320.

There could be no election to take the fund as land or money; for, where an estate is directed to be sold, and the money divided amongst several persons, none has a right to say that any part shall not be sold;¹ the question, therefore, is merely between the real and personal representatives of the son, whether the personal representative shall take the fund as personal property according to the will, or the heir-at-law shall take it, as if no will had been made.

The case of *Flanagan v. Flanagan*² is a strong authority that it shall be taken as a personal estate, according to the will. In that case the testatrix, Sarah Wooley, by will, dated 28th March, 1749, gave and devised all her real and personal estates to Francis Plumtree, in trust, in the first place, out of her personal estate, as far as it would extend; and, in the next place, by sale of her real estate, or a sufficient part thereof, to raise so much money as should be sufficient to pay her debts and legacies; and, after payment thereof, in trust to convey the residue of the real estate which should remain unsold, and pay the produce of such part as should be sold, and all other the residue of her real estates, between her father, James Flanagan, and her brother, James Flanagan, their heirs, executors, and administrators, equally. A bill was brought by the creditors for sale of the real estate, to supply the deficiency of the personal estate, for payment of debts, and a decree was made for a sale; and if any of the money to arise by the sale should remain after payment of the debts and legacies, it was directed to be paid to James Flanagan, the father, and James Flanagan, the son, equally; and if any estate should remain unsold, the trustees were directed to convey it to them and their heirs, equally; after the decree, James Flanagan, the son, died *leaving a daughter, and a son, born after his death; part [*831] of the estate was sold, and afterwards, James Flanagan, the grandfather, died, leaving his grandson his heir, and his grandson and granddaughter his sole next of kin; after the death of the grandfather, a further part of the estate was sold, under an apprehension that the produce of the first sale was insufficient to pay the debts and legacies: it appeared, however, that the produce of the first sale was sufficient. A bill was afterwards brought by the son of James Flanagan, the son, claiming a moiety of the surplus, as the real estate of James Flanagan, his grandfather, to whom he was become heir, against the personal representative of his grandfather, and against the daughter of James Flanagan, the son, who claimed a moiety as one of the next of kin of her grandfather. It was objected, that the second sale, after the death of the grandfather, was improper. The Court determined, that the second sale, actually made under the decree of the Court, before the Master, could not be considered as

¹ See also *Deeth v. Hale*, 2 Moll. 317; *Smith v. Claxton*, 4 Madd. 493; *Chalmer v. Bradley*, 1 J. & W. 59; *Trower v. Knightly*, 6 Madd. 134.

² See this case cited and explained by Mr. Scott *arguendo* in *Ackroyd v. Smithson*, post.

improperly made; that there was no fraud, no practice, and that the money ought to go to the personal representative of the grandfather. The case of *Digby v. Legard*,¹ is a different question. There the testatrix (Elizabeth Byerley) directed her real estates to be sold to pay debts and legacies, and gave the residue to five persons, to be equally divided between them, one of whom (Lady Cayley) died in her lifetime. It was resolved that the devise, so far, failed totally, and should accrue to the heir-at-law. The language of the decree is such, that the benefit of the devise to Lady Cayley should accrue to the testatrix's heir-at-law, Mr. Jervoice, who was a lunatic, and should be paid to his committee, as real estate descended to him. The case of *Scudamore v. Scudamore*, Prec. Ch. 543, shows, that in all cases where the dispute is between representatives, the heir or executor shall have the fund, according to the will or contract of the persons who gave or created it. There was a case of *Ogle v. Cook*,² heard 12th February, 1748, which was this: Mr. Ogle made his will in 1744, and gave [*832] his real estate to trustees to sell, and to vest the money in stock, and pay the interest to his wife during the widowhood, and after her death, or marriage, to his two daughters equally, except that the eldest was to have 1000*l.* more than the other; he gave the residue of his personal estate in the same way. He afterwards conveyed the real estate to one of the trustees named in his will, to whom he was considerably indebted, in trust to sell so much as should be necessary to pay the debt, and as to the residue, in trust for Mrs. Ogle: part of the estate was sold, and then Mr. Ogle died. His youngest daughter died in his lifetime. The bill was brought by the widow and the eldest daughter, against the son who was the heir, and the trustees, to have the residue of the estate sold, and claiming the share of the youngest daughter, as personal estate of Mr. Ogle, to be divided between them and the son as his next of kin. The son insisted the conveyance to the trustee was a revocation of the will; and, if not, that the share of the dead daughter was to be considered as real estate of Mr. Ogle, and descended to him as heir. It was determined that the conveyance was a revocation only pro tanto, to let in the debt; and that so much of the estate as remained unsold, should be sold, and that the money raised, or to be raised, by sale of the estate, made part of the personal estate of Mr. Ogle. There was another case about the same time, which is in 1 Ves. 174 (*Cunningham v. Moody*), where, by marriage articles, 500*l.* was agreed to be laid out in purchase of lands, to be settled to the use of the husband for life, with remainder to trustees to preserve contingent remainders, with remainder to the wife for life, with remainder to the children of the marriage, as the hus-

¹ 3 P. Wms. 22 n.

² See *Collins v. Wakeman*, 2 Ves. jun. 686, where Lord Loughborough says, that he had caused the Reg. Lib. to be examined, and it was found that the point supposed to have been decided by *Ogle v. Cook*, was in reality left undecided.

band and wife should appoint; and in default of a joint appointment, as the survivor should appoint; and in default of any appointment, to the children, to be equally divided among them; if more than one, as tenants in common, in tail general, with cross remainders; and if but one, to that child in tail general; and no appointment was made. The father and mother being dead, and the *daughter being married, the trustees paid the 500*l.* [*833] to her and her husband, and they received it as money, and executed a release. The daughter had a child, which died, and she afterwards died without issue. A daughter of the settlor, by a second marriage, filed a bill against the husband, representative of his wife, the daughter by the first marriage, for the 500*l.*, considering it as land; and it was observed, that she was entitled to the money, but that the husband of her deceased sister was entitled to the interest during his life, as tenant by the curtesy.

In the present case, William Fletcher, the son, had the whole beneficial title vested in him as money, subject to his mother's interest for life or widowhood. She was his sole next of kin, and her personal representatives are now entitled to the estate as money: the bill must, therefore, be dismissed without costs.

In the judgment of Sir Thomas Sewell in the principal case, the equitable doctrine of constructive conversion is thus accurately stated, viz.: "that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this, in whatever manner the direction is given—whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money, or money land:" see *Wheldale v. Partridge*, 5 Ves. 396, where this statement of the doctrine is repeated and approved of by Lord Alvanley, M. R.

As to the conversion of money into land by contract or will.—The authorities shew, that money agreed or directed to be laid out in land, becomes land so completely, as to acquire all the properties of land; thus it will be considered as real and not personal assets. Suppose, for instance, A. bequeathed a sum of money to trustees, upon trust to purchase lands, and settle them upon B. and his heirs, or by marriage articles money had been agreed to be laid out in lands for B. and his heirs, on the death of B., without a purchase having been *made, the [*834] money will be considered as land: and, therefore, it would not, previously to 3 & 4 Will. 4, c. 104, have been liable to the payment of the debts of B. by simple contract: *Whitwick v. Jermin*, cited in *Ba-*

den v. Earl of Pembroke, 2 Vern. 58; *Lawrence v. Beverley*, cited ib. 55; *S. C.*, 2 Keb. 841; *Fulham v. Jones*, cited *Pulteney v. Darlington*, 7 Bro. P. C. 530; *Foone v. Blount*, Cowp. 467. But it would be bound as real assets by a judgment: *Frederick v. Aynscombe*, 1 Atk. 392. However, since the passing of 3 & 4 Will. 4, c. 104, money directed to be laid out in the purchase of land will be liable, as other *real assets*, to the payment of simple contract debts.

Upon the same principle, money agreed or directed to be converted into land, will be subject to tenancy by the curtesy; thus, in *Sweetapple v. Bindon*, 2 Vern. 536, where A. bequeathed 300*l.* to be laid out in land, and settled to the use of her daughter and her children, and if her daughter died without issue, to go over, the husband of the daughter was held to be tenant by the curtesy, although no purchase had been made during his wife's lifetime. And see *Cunningham v. Moody*, 1 Ves. 174; *Dodson v. Hay*, 3 Bro. C. C. 404; *Follett v. Tyrer*, 14 Sm. 125: but since, by a singular anomaly, a woman was not entitled to dower out of an equitable estate, she was not dowable out of money directed to be laid out in land: *Cunningham v. Moody*, 1 Ves. 176; *Crabtree v. Bramble*, 3 Atk. 687; but now, by 3 & 4 Will. 4, c. 105, women married after the 1st of January, 1834, whose dower has not been barred, will be dowable out of equitable estates, and it would seem to follow that they will be dowable out of money to be laid out in lands of inheritance.

Money agreed or directed to be laid out in land, will pass under a general devise of all the lands of the person entitled to it (*Greenhill v. Greenhill*, 2 Vern. 679; *Prec. Ch.* 320; *Guidot v. Guidot*, 3 Atk. 256; *Rashleigh v. Master*, 1 Ves. jun. 201; *S. C.*, 3 Bro. C. C. 99; *Biddulph v. Biddulph*, 12 Ves. 161; *Green v. Stephens*, 17 Ves. 77); or by a devise of "all his lands in a particular county, or elsewhere," although it has been argued, that the testator must have alluded to land, and something local: *Lingen v. Sowray*, 1 P. Wms. 172.

Although a will not coming within the operation of the late Wills Act (1 Vict. c. 26), would not pass lands agreed to be purchased *after* its execution (*Langford v. Pitt*, 2 P. Wms. 629); yet, where money was agreed or directed to be laid out in the purchase of lands, to be settled on the testator and his heirs, even if the money were not laid out in the purchase of lands until after he had made his will, they would in equity [*835] pass by it under a general *devise. See *Lingen v. Sowray*, 1 Eq. Ca. Ab. 175, pl. 5; but now, lands purchased after the execution of a will may pass by it at law. See 1 Vict. c. 26, s. 24, which enacts, "that every will shall be construed with reference to the real estate, and personal estate, comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Upon the same principle, money agreed or directed to be laid out in

land will not pass as money by a general bequest to a legatee; though it will by a particular description, as so much money to be laid out in land (*Cross v. Addenbrook*, cited in the note to *Lechmere v. Earl of Carlisle*, 3 P. Wms. 222; *Edwards v. The Countess of Warwick*, 2 P. Wms. 171; *Gillies v. Longlands*, 4 De G. & Sm. 372); and although previously to the late Wills Act (which enacts, that no will of an infant shall be valid), infants of the age of fourteen years might by will have disposed of their personalty, they could not, by will, have disposed of money directed to be converted into land: *Earlom v. Saunders*, Amb. 241. ✓

Money agreed or directed to be laid out in the purchase of land, acquires the descendible properties of land; but with respect to the rights of the heir of the person upon whom money impressed with the character of realty is settled, it is necessary to distinguish between those cases where the heir claims the payment of the money from strangers, and those cases where he claims the payment from the personal representatives of his own ancestor. Where the heir claims payment of the money from strangers, he will, it seems, in all cases be preferred to the personal representatives of his ancestor. Thus, where money has been bequeathed to be invested in land, for the use of the ancestor and his heirs; or where, on the marriage of the ancestor, money has been deposited, either by him or by a stranger, in the hands of trustees, to be laid out in land, to be settled upon himself for his life, remainder to his wife for her life, with remainder to their issue, and in default of issue to the ancestor and his heirs; or if, on the marriage of the ancestor, there be a covenant on the part of a stranger to lay out money in the purchase of land, to be settled to the same uses, and the ancestor die without issue—in all these cases the heir of the ancestor, and not his personal representatives, will be entitled to the money to be laid out in the purchase of land: *Scudamore v. Scudamore*, Prech. Ch. 543; *Disher v. Disher*, 1 P. Wms. 204; *Chaplin v. Horner*, 1 P. Wms. 487; *Edwards v. Countess of Warwick*, 2 P. Wms. 171; *Knights v. Atkins*, 3 Vern. 20.

*If the heir seeks payment of the money from the personal representative of the ancestor, his claims will be superior to those of [*836] the personal representatives, if there be any prior outstanding interest in the fund in another person. Thus, where the ancestor has covenanted to lay out a sum of money in land, to be settled upon himself for life, remainder to his wife for her life, remainder to the issue of the marriage; if, on the death of the ancestor, the wife or any issue be living, although they may afterwards die, the heir can call upon the personal representatives for the money; *Kettleby v. Atwood*, 1 Vern. 298, 471; *Lancy v. Fairechild*, 2 Vern. 101; *Chaplin v. Horner*, 1 P. Wms. 483; *Lechmere v. Earl of Carlisle*, 3 P. Wms. 211: Cas. t. Talb. 80: *Oldham v. Hughes*, 2 Atk. 452; *Wrightson v. Macauley*, 4 Hare, 487.

If, however, the wife die in the lifetime of the ancestor, leaving no issue of the marriage, then, as the obligation to lay out and the right to call for the money centre in the same person—viz., the ancestor—the covenant, without any act on his part, will be considered as discharged: the money, to use a quaint expression, is “*at home*,” and the heir will have no equity against the representatives of his ancestor. Thus, in *Chichester v. Bickerstaff*, 2 Vern. 295, it appears that, on the marriage of Sir John Chichester with the daughter of Sir Charles Bickerstaff, Sir Charles, by articles, was to pay 1500*l.* in part of the portion, which, together with 1500*l.* more, to be advanced by Sir John within three years after the marriage, was to be invested in land, and settled on Sir John for life, his intended wife for life, remainder to their issue, remainder to Sir John’s right heirs. Within a year of the marriage the wife died, and Sir John three days after without issue. Sir John, by his will, made Sir Charles *his executor*, and devised the residue of his personal estate, after debts, &c., paid, to Frances Chichester, his sister. The heir-at-law of Sir John filed a bill against Sir Charles, to compel him to pay the 1500*l.*, insisting that, by virtue of the marriage articles, the money ought to be looked on and considered in equity as land, and therefore belonged to him as heir. But Lord Somers said, “This money, though once bound by the articles, yet when the wife died without issue, became free again, and was under the power and disposal of Sir John, as the land would likewise have been in case a purchase had been made pursuant to the articles, and therefore would have been assets to a creditor, and must have gone to the executor or administrator of Sir John; and this case is much stronger where there is a residuary legatee;” and therefore dismissed the bill. Doubts have been thrown upon *this case [*837] by Sir Joseph Jekyll, M. R., in *Lechmere v. Earl of Carlisle*, 3 P. Wms. 221, and by Lord Talbot, in *Lechmere v. Lechmere*, Cas. t. Talb. 90; but they seem to have supposed that the plaintiff in this suit sought the 1500*l.* which Sir Charles was to pay, and to have overlooked the fact, that Sir Charles was the executor of Sir John, and that the plaintiff must have claimed the 1500*l.* to be advanced by Sir John. In the great case of *Pulteney v. Darlington*, 1 Bro. C. C. 238, Lord Thurlow, evidently considered that the 1500*l.* to be paid by Sir John was sought by the heir-at-law from the assets in the hands of Sir Charles, *his executor*; for he says, “Where a sum of money is in the hands of one, without any other use but for himself, it will be money, and the heir cannot claim; like the case of *Chichester v. Bickerstaff*, against which I think there is no judgment, though there are a number of opinions.—I know no better authority than that case.” In the case of *Pulteney v. Darlington*, 1 Bro. C. C. 223, money impressed with the qualities of realty had come to the hands of the person (Lord Bath) solely entitled to it under the ultimate limitation in fee; and the person

so entitled, without taking any notice of the particular sum, devised all his manors, &c., which he was seised or possessed of, or to which he was in anywise entitled in possession, reversion, or remainder, or which should thereafter be purchased with any trust monies (except certain estates therein mentioned), to his brother H. in fee, and gave him all the residue of his personal estate, and made him executor. His brother H. subsequently, by his will, gave all his estates, by local descriptions, to certain uses therein mentioned, and all his money, securities for money, goods, chattels, and personal estate, not before disposed of, to his executors, for certain trusts mentioned in his will. Lord Thurlow affirming the decree of Lord Bathurst, dismissed the bill brought by the heir-at-law to have the money laid out in land. "If," said his Lordship, "A. B. has in his possession 20,000*l.* to be laid out in land for his use, he has nobody to sue; the right and the thing centering in one person, the action is extinguished;" and after citing and commenting upon the cases on this subject his Lordship added, "The use I make of these cases, notwithstanding the dicta they contain, is this, that where a sum of money is in the hands of one without any other use but for himself, it will be money, and the heir cannot claim. . . . But whether that is clearly so or not, circumstances of demeanour in the person (even though slight) will be sufficient to decide it: a very little would do; receiving it from the trustees, there is no doubt, would be sufficient. Lord Bath did receive it; he had it in his hands. Suppose he had it by way of *covenant—otherwise, where would there be an end? If he [838] kept it, subject to a covenant to lay it out for fifty years, should the heir come for it at the end of that term? It would lead to infinite inconveniences." This decision was affirmed upon appeal in the House of Lords, 7 Bro. P. C., Toml. ed. 530, and "went," as Lord Eldon says, "no further than this, that if the property was *at home*, in the possession of the person under whom they claimed as heir and executor, the heir could not take it; but if it stood out in a third person he might; and the question in that cause was, not upon the equity between the heir and executor, but whether the money was *at home*:" 8 Ves. 235; *Rich v. Whitfield*, 2 L. R. Eq. 583.

It may be here mentioned, that Lord Rosslyn, in the case of *Walker v. Denne*, 2 Ves. jun. 175, 176, observed, that, as between the heir and personal representative, their rights were pure legal rights; that chance decided what should be real, what personal; and that neither had a scintilla of equity to make the property that which it is not in fact. And the same opinion is expressed in *Oxenden v. Lord Compton*, 2 Ves. jun. 70; *Lord Compton v. Oxenden*, 2 Ves. jun. 265. This doctrine, however, of Lord Rosslyn's has been repeatedly dissented from in subsequent decisions. "I am disposed," said Lord Eldon, "to say, notwithstanding the opinion of Lord Rosslyn, in *Walker v. Denne*, and some other modern authorities, that if an instrument is to be taken to

impress a fund with real qualities immediately upon the execution, in the question between the heir and executor, the money being once clearly impressed with real uses, as land, and one of these uses being for the benefit of the heir, the impression will remain for his benefit; and, to put an end to that impression, it must be shown either that the money was in the possession of a person who had in himself both the heirs and executors, or he must do some act to denote a change of his intention as to the devolution of the property upon either; and it is not correct to say the Court does not interpose between volunteers, if they give to the executor that money which the instrument has given to the heir." *Wheldale v. Partridge*, 8 Ves. 235. See *Lechmere v. Lechmere*, Cas. temp. Talb. 90; and Sir W. Grant, M. R., in *Thornton v. Hawley*, 10 Ves. 138, also observes, "There is no weight in the circumstance that the property is found in the shape of money or land, for the character is be found in the deed; and in *Wheldale v. Partridge*, the Lord Chancellor lays down, in which I perfectly concur, that it is a circumstance that goes no way, except when the fund gets into the possession of a [*839] party who *would have it in either way:" *Kirkman v. Miles*, 13 Ves. 338; and see *Stead v. Newdigate*, 2 Mer. 521; *In re Pedder's Settlement*, 5 De Gex, Mac. & G. 890.

Money notionally converted into land, will not, however, be considered as converted into land so as to render it liable to succession duty. See *Re De Lancey*, 5 L. R. Exch. 102; there the testator, who died in 1800, by his will bequeathed to trustees a fund to be laid out in land, which was to be conveyed to the use of his eldest son for life, remainder to his first and other sons in tail male, remainder to the testator's second son for life, with remainder to his first and other sons in tail male; with remainder to the testator's own right heirs. The testator's two sons died without issue and intestate, and at the death of the survivor, the testator's daughter, his only other child, became entitled to the fund as his heir-at-law, and also as heir-at-law of her two brothers. The fund was never invested, and remained money at the death of the daughter. No act had been done by any one amounting to an election to treat the fund either as money or as land, and a grandson of a brother of the testator took the fund as heir-at-law. It was held by the Court of Exchequer Chamber, affirming the decision of the Court of Exchequer (reported 4 L. R. Ex. 345), that the fund was not liable to succession duty under (16 & 17 Vict. c. 51) s. 50, as being converted into land, but to legacy duty as personalty, and subsequently it was held that duty was payable at the rate of 5*l.* per cent.: 6 L. R. Exch. 286; *S. C.*, affirmed in the Exch. Ch. 7 L. R. Exch. 140.

It seems that money agreed or directed to be laid out in land, and settled upon a person in fee, will not upon his death without heirs be converted in equity, so that it should escheat to the Crown. "To convert for the Crown," says Lord Rosslyn, "is too extraordinary for a

court of equity:" *Walker v. Denne*, 2 Ves. jun. 170, 185; *Burgess v. Wheale*, 1 Eden, 177; *Henchman v. Attorney-General*, 3 My. & K. 483, 494.

Where money impressed with the character of realty belongs to a person who is convicted of felony, it will not be forfeited to the Crown, as would be the case, if it were not for the notional conversion: *Re Harrop's Estate*, 3 Drew, 726; and see *In re Wharton*, 5 De G. Mac. & G. 33; *In re Thompson's Trusts*, 22 Beav. 506; *Attorney-General v. Sands*, Tud. Lead. Ca. R. Prop. 2nd ed. 664, 694.

It may be here mentioned that where personalty has been left to be invested in land to go upon the same trusts as other real property, it may, in some cases, be laid out in improving such real *property. [*840] Thus, in the case of *Lord Hotham's Trusts*, 12 L. R. Eq. 76, the late Lord Hotham, by his will, directed his trustees to lay out his residuary personalty in the purchase of land to go along with certain settled property. The settled property comprised an advowson, of which the parsonage-house was, at the testator's death, in a ruinous state, and he was about to rebuild it. It was held by Sir R. Malins, V. C., that the trustees might properly lay out part of the residuary personalty in rebuilding the house, inasmuch as by so doing they would increase the value of the advowson, and, therefore, of the settled estates. See also *In re Incumbent of Whitfield*, 1 J. & H. 610; *In re Dummer's Will*, 2 De G. Jo. & Sm. 515.

As to the conversion of land into money by contract or will.—Upon the same principle as money agreed or directed to be laid out in land will be considered in equity as land, so land agreed or directed to be sold will be considered as money, and as such will not pass under a devise of land (*Elliott v. Fisher*, 12 Sim. 505); but will pass under a general residuary bequest of personal estate (*Stead v. Newdigate*, 2 Mer. 521; *Farrar v. Earl of Winterton*, 5 Beav. 1; *Midland Counties Railway Company v. Oswin*, 1 Coll. 74; *Gover v. Davis*, 29 Beav. 222; and see *Savile v. Kinnard*, 11 Jur. (N. S.) 195, 13 W. R. (V. C. K.) 308); and in case of intestacy, will go to the personal representatives (*Gilb. Lex Prætoria*, 243; *Ashby v. Palmer*, 1 Mer. 296; *Burton v. Hodsoll*, 2 Sim. 24; *Biggs v. Andrews*, 5 Sim. 424; *Elliott v. Fisher*, 12 Sim. 505; *Griffith v. Ricketts*, 4 Harq. 299; *Hardey v. Hawkshaw*, 12 Beav. 552): who may maintain a bill, in the case of a contract to sell by a vendor, against his heir-at-law and the purchaser for specific performance: *Hoddel v. Pugh*, 33 Beav. 489.

A mere notice to treat given by a railway company, or other persons having compulsory powers to purchase lands, to an owner of land in fee (being *sui juris*), although it may so far constitute an obligation as to enable the company to restrain the landowner from putting up the property for sale by auction (*The Metropolitan Railway Company v. Woodhouse*, 11 Jur. (N. S.) 296; 13 W. R. (V. C. S.) 516), will not

operate as a conversion of the land into personalty (*Haynes v. Haynes*, 1 Dr. & Sm. 426, where Kindersley, V. C., overruling *Walker v. The Eastern Counties Railway Company*, 6 Hare, 594), although the landowner state the price he is willing to accept, if he die before the acceptance of his offer; *Re Battersea Park Acts, Ex parte Arnold*, 32 Beav. [*841] 591; 2 N. R. 257; *Richmond v. North London Railway Company*, 5 L. R. Eq. 352, 358. It is clear, moreover, that the notice given by the railway company to the landowner cannot operate for an indefinite time; it must be acted upon within reasonable time, or it must be deemed to be abandoned: *Richmond v. North London Railway Co.*, 5 L. R. Eq. 358.

But where a notice to take lands by a company under their compulsory powers is followed up by the company and landowner fixing upon the price, the contract is complete, and conversion will take place. Thus, in *Ex parte Hawkins*, 13 Sim. 569, the Common Council of London being empowered by a local Act of Parliament to take a freehold house belonging to A., for the purposes of the act, at the expiration of six months after notice given of their intention to take the same, served A. with the required notice in September, 1840. *The amount of the purchase-money was afterwards agreed upon*, and an abstract of A.'s title was sent to the Common Council. In April, 1841, A. died, having by his will, dated in 1837, devised his real estate to B., and his residuary personal estate to C. Upon a petition being presented by the executors of the residuary legatee for the payment to them of the purchase-money, which after A.'s death, had been paid into court under the act, it was contended by the devisee, that as the notice given by the Common Council of their intention to take the premises did not amount to a binding contract within the Statute of Frauds, the purchase-money retained the character of realty. However, Sir L. Shadwell, V. C., held, that it was part of the testator's personal estate, and that, subject to his debts, it belonged to his residuary legatee. "Although," said his Honor, "there was no binding contract within the Statute of Frauds, I think that there was that which was tantamount to it; for the act made it lawful for the Common Council to take and use any tenements and hereditaments which they might deem it necessary or expedient to take, use, or pull down and remove for the purposes of the act, at the expiration of six months after notice in writing of their intention to take or use the same, given to the owners or the occupiers thereof. The effect of that provision was to give to the Common Council a parliamentary power to contract for the tenements required for the purposes of the Act; and under the same provision, they had power to enter upon the tenements at law: a much stronger power than could have been given by any private contract between them and the owners of the tenements." And see *Midland Counties Railway Company v. Oswin*, 1 Coll. 74; *Galliers v. Allen*, 13 Sim. 577, n.; *The Regent's Canal Company v.*

Ware, 23 Beav. 575; **Nash v. The Worcester Improvement Commissioners*, 1 Jur. (N. S.) 973. [*842]

So where the owner in fee of an estate having devised it to an infant, agreed with a Railway Company under their compulsory powers to sell a portion of it to the Company. The owner died before the completion of the purchase, without having altered his will. It was held by Sir J. Romilly, M. R., that the executors of the landowner, and not the devisee, were entitled to the purchase-money, and to the compensation for severance, and that the Railway Company was bound to pay the costs of the infant devisee: *In re The Manchester and Southport Railway Company*, 19 Beav. 365.

Where the donee of a power agrees to sell land to a Railway Company, and dies before the execution of the power, a Court of equity will supply the defect in the execution of the power, and the personal representative of the donee will be entitled to the purchase-money as personal estate. See *In re Dykes' Estate*, 7 L. R. Eq. 337: there under a settlement, certain lands stood limited to such uses as Dykes should by deed appoint, and subject thereto to the use of Dykes and the heirs of his body, with remainders over. Dykes was also entitled in fee to certain other lands. A Railway Company required part, both of the settled estate, and of the lands to which Dykes was absolutely entitled. By an agreement, not under seal, made between Dykes and two of the directors of the Company, after reciting that Dykes was owner of certain lands, part of which, being those specified in the schedule thereto, were required by the Company, and that the purchase-money and compensation to be paid to Dykes, in respect of the taking of such lands had not been ascertained, and that it had been agreed to refer these matters to arbitrators and an umpire therein named, the parties thereto bound themselves to abide by the determination of the arbitrators and umpire. The schedule comprised the lands required by the Company, without any distinction as to the titles under which they were respectively held, and a single sum was awarded to Dykes as the purchase-moneys for the whole thereof. Before any conveyance was executed Dykes died. It was held by Lord Romilly, M. R., that the agreement operated in equity, as an execution of the power of appointment in the settlement, and that the purchase-money was payable to the legal personal representative of Dykes, as part of his personal estate. "The principle," said his Lordship, "upon which a Court of equity proceeds is, that when a person enters into a contract for the execution of a power of appointment for valuable consideration, *but does not carry it into effect and exercise the power, the Court will supply the defect. It is said [*843] that here the vendor has not entered into such a contract, but I think that is saying too much. The testator entered into a contract to do that which, if done, would be a good execution of the power. He contracted to sell at a price to be found by arbitration; the price has been found;

and that constitutes a good contract, which could be enforced against him and his heirs and devisees. If he had carried this contract into effect, and executed a deed, there would have been a good execution of the power, and I am therefore of opinion, that this is a case bound by the general rules of equity, with respect to the defective execution of powers."

If, however, the agreement of the Railway Company should not be for the *purchase of land*, but merely, that if the Company take any land under the *compulsory powers* of their Act, the amount shall not be determined by a jury, but shall be at a fixed sum per acre, inasmuch as the subject-matter of the contract is not the land but the *price* of the land, conversion will not take place, and upon the death of the landowner, before the land is taken by the Company, it will go to the persons entitled to his real estate: *Ex parte Walker*, 1 Drew. 508.

Formerly when a person who had entered into a contract for the purchase of land in fee died before the contract was completed, his devisee as well as his heir-at-law was entitled to have the purchase-money paid out of the personal estate; but he was bound to show that there was a binding contract at the death of the purchaser, and one which could be enforced against an unwilling purchaser: *Garnett v. Acton*, 28 Beav. 833; and see *Langford v. Pitt*, 2 P. Wms. 629, 632; *Broome v. Monck*, 10 Ves. 597, 612, 615.

Where the purchaser at the time of his death was under a contract to purchase realty, which might then have been specifically enforced against him, the right of his real representative was not affected by anything which took place subsequently. Thus, if the contract ceased to be binding on the purchaser's representatives in consequence of the felling of ornamental timber by the vendor (*Dart V. & P.* 245, 4th ed.), or was rescinded by the vendor on the ground of delay (*Whittaker v. Whittaker*, 4 Bro. C. C. 31), or under a power reserved to him in the contract (*Hudson v. Cook*, 13 L. R. Eq. 417), the real representative of the purchaser was entitled to receive the purchase-money out of his personal estate. See also *Curre v. Bowyer*, 5 Beav. 6, n.; *Ayles v. Cox*, 16 Beav. 23.

[*844] Where an heir-at-law adopted *a parol contract of his ancestor to sell land, it was considered to have been converted, and the proceeds to belong to the personal representatives of the ancestor. See *Frayne v. Taylor*, 33 L. J. Ch. (N. S.) 228. There A. B. entered into a verbal agreement to sell certain real estate, but died intestate as to his real estate before the agreement was carried into effect. His heir-at-law took out letters of administration, and, upon the request of the purchaser, executed a conveyance of the estate, which recited the parol contract and the desire of the purchaser to have it completed, and the consent of the heir to do so. Upon passing the residuary accounts of A. B.'s estate, the heir, as administrator, gave credit for the

sale-moneys as "produce of property contracted to be sold in A. B.'s lifetime, and purchase completed after his death." The heir subsequently claimed the proceeds of the sale as arising from property coming to him as heir-at-law. It was however held by Sir R. T. Kindersley, V. C., that although the heir might have repudiated the verbal agreement, and claimed the lands as heir, and sold them himself in that character, yet, as he had in fact adopted and carried out the agreement of A. B., the land must be considered as retrospectively well converted into personal estate, and that the proceeds of the sale belonged to the next of kin. "It is true," said his Honor, "the testator or the purchaser might have said, 'The Statute of Frauds prevents you from compelling me to perform,' but the statute does not make the agreement void. The statute says, no suit shall lie to compel him to carry into effect a verbal agreement. It appears to me what the defendant has done is with design, and not by mistake, but knowing what he was about; he chose to say, 'I will carry out the contract of the testator,' and he did so."

It seems that if the heir-at-law in such a case had acted under a mistake, the Court would have allowed the matter to be rectified. *Ib.* p. 232.

So where a person contracted with a builder to erect a house on a piece of freehold land belonging to him, and died intestate before the house was finished, it was held by Lord Romilly, M. R., that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate: *Cooper v. Jarman*, 3 L. R. Eq. 98.

It must, however, be remembered, that under 30 & 31 Vict. c. 69, amending Locke King's Act (17 & 18 Vict. c. 113) the *devisee* of a purchaser has lost his right to compel the personal representatives to discharge the unpaid purchase-money (see ante p. 330, 668), but the right of the heir-at-law to do so still remains intact: **Harding* [*845] v. *Harding*, 13 L. R. Eq. 493.

A contract by a trustee for sale, for the purchase of the trust property, as it cannot be enforced in equity, will not be considered, as between the real and personal representatives of the purchaser, as a conversion of the purchase-money into realty. Thus, in *Ingle v. Richards*, 28 Beav. 361, a trustee for sale bought the trust estate at an auction, and died. It was held by Sir John Romilly, M. R., that his heir-at-law had no right, as against his next of kin, to have the contract completed for his benefit. "I am clear," said his Honor, "that a mere contract between a trustee for sale and himself, as purchaser, to sell with one hand, and to buy with the other, is not a sufficient contract, which can be specifically enforced at the instance of the heir-at-law, for the purpose of converting his personal estate into real estate, and thus altering the mode of descent."

Upon the same principle—viz., the notional conversion of land into money—an alien, although he could not previously to the Naturalisa-

tion Act, 1870 (33 Vict. c. 14) hold land as against the Crown, would nevertheless, be entitled to the proceeds arising from the sale of land devised to trustees to sell for his benefit: *Du Hourmelin v. Sheldon*, 1 Beav. 79, affirmed on appeal by Lord Cottenham, 4 My. & Cr. 525. Where, however, there was no trust for absolute conversion, and the heir was an alien, the Crown was entitled to the estate: *Fourdrin v. Gowdey*, 3 My. & K. 383. But now, by the Naturalisation Act, 1870, which is not retrospective, aliens may hold property of every description like a British-born subject: *Sharp v. St. Sauveur*, 7 L. R. Ch. App. 343.

Where land is devised to trustees upon trust to convert into money for purposes, which either fail or never take effect, and the testator dies without heirs, the lord cannot claim by escheat, as there are tenants in possession, nor has the Crown any right to come into equity to ask that the land should be converted, in order that it might take the money as *bona vacantia*, nor even if the land has been unnecessarily converted, can the Crown make good any claim, as the money will be the absolute property of the trustees: *Taylor v. Haygarth*, 14 Sim. 8; *Walker v. Denne*, 2 Ves. jun. 185; *Cradock v. Owen*, 2 Sm. & G. 241.

The Court will execute a trust of lands for an alien (created prior to the Naturalisation Act, 1870), in favour of the Crown: *Barrow v. Wadkin*, 24 Beav. 1; *Sharp v. St. Sauveur*, 7 L. R. Ch. App. 343, overruling *Rittson v. Stordy*, 3 Sm. & Giff. 230.

The doctrine of equitable conversion is not sufficient to give a court [*846] of probate jurisdiction over a will limited to real property. See *In the goods of Jane Bardon*, 1 L. R. (P. & D.) 325; there it was held by Lord Penzance that a will limited to the disposition of real property only was not entitled to probate, although it contained the appointment of an executor, and the real estate was given to such executor, with directions to convert the same into personal estate.

Conversion must be imperative.—The direction to convert either money into land or land into money must be express and imperative; for if conversion be merely optional, the property will be considered as real or personal, according to the actual condition in which it is found. Thus, in *Curling v. May*, cited 3 Atk. 255, A. gave 500*l.* to B., in trust that B. should lay out the same upon a purchase of lands, or put the same out on good securities, for the separate use of his daughter H. (the plaintiff's then wife), her heirs, executors, and administrators, and died in 1729. In 1731, H., the daughter, died without issue, before the money was invested in a purchase. The husband, as administrator, brought a bill for the money against the heir of H., and the money was decreed to the administrator; for the wife, not having signified any intention of a preference, the Court would take it as it was found; if the wife had signified any intention, it should have been observed, but it was not reasonable at that time to give either her heir or administrator,

or the trustee, liberty to elect; for Lord Talbot said, it was originally personal estate, and yet remained so, and nothing could be collected from the will, as to what was the testator's principal intention: See also *In re Ibbitson's Estate*, 7 L. R. Eq. 229.

So, likewise, if money is directed to be laid out "in government or other securities, or in the purchase of freeholds," or "to remain at interest, or be laid out in land," or "to be laid out in freeholds or leaseholds;" or if similar expressions are made use of, leaving the nature of the investment optional, or which do not sufficiently indicate an intention that the money should be laid out in the land at all events, no conversion will take place until the trustees have actually exercised their discretion, which, when clearly given to them, the Court will not control. See *Van v. Barnett*, 19 Ves. 102; *Amler v. Amler*, 3 Ves. 583; *Walker v. Denne*, 2 Ves. jun. 170; *Wheldale v. Partridge*, 5 Ves. 388; *S. C.*, 8 Ves. 227; *Polley v. Seymour*, 2 Y. & C. Exch. Ca. 708; *Smithwick v. Smithwick*, 12 Ir. Ch. Rep. 181; *Atwell v. Atwell*, 13 L. R. Eq. 23.

In *Bourne v. Bourne*, 2 Hare, 35, real estate was conveyed to a trustee, on trust to permit a mortgagor to receive the rents and profits, and upon payment of the *principal and interest of the mortgage debt, as therein mentioned, to reconvey the estate to the [*847] mortgagor, his heirs and assigns; but if default should be made in such payment, then that the trustees should enter into possession of the premises, and, at his discretion, sell the same, and pay over the residue or surplus (after payment of the debt, interest, and costs) to the mortgagor, his heirs, executors, administrators, or assigns. There was default in payment, but no sale of the estate took place until after the death of the mortgagor, who devised it to the plaintiffs for life, with remainder over in tail. Sir James Wigram, V. C., held, that there was no conversion, but that the surplus proceeds passed by the devise as real estate. "If," said his Honor, "the trustee had taken the property, with absolute directions to sell and convert it, the circumstance, that the directions had not been carried into effect at the death of the testator, might have been immaterial, and it might have been treated as personalty. But in this case, there was no absolute or compulsory direction for the sale or conversion of the estate; it is merely an authority, in a certain event, to enter into possession of this estate, and at the discretion of the trustee to sell it, for the purpose of recovering payment of the debt for the mortgagee. The direction to reconvey the estate, in case of payment of the mortgage-money, is inconsistent with the notion that there was any intention that the property should be absolutely converted by the effect of the conveyance. The event upon the happening of which the trustee might at his discretion have sold the estate—namely, the default in payment of the mortgage-money—took place in the lifetime of the testator; but the discretion to sell had not been ex-

exercised at the time of his death. The consequence is, that the estate passed to his devisees as realty, subject to the mortgage, and the trustee must therefore account to the devisees for the surplus proceeds of the sale."

And where trustees have a mere power with the consent of a person in possession of certain settled estates to lay out personal property in land to be settled to the same uses, no absolute conversion takes place. *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524; *Lucas v. Brandreth*, 28 Beav. 273; *Edwardes v. Tuck*, 23 Beav. 268.

So, where money was to be laid out in the purchase of lands in fee simple, or for a long term of years absolute or determinable on lives, or of copyhold or customary lands, "with the joint approbation and consent of the husband and wife, and not without," and no approbation or consent was given by them, the money was considered as unconverted, and to remain as personal estate: *Davies v. Goodhew*, 6 Sim. 585.

[*848] *But although conversion is apparently optional, as where trustees are directed to lay out personalty, "either in the purchase of lands of inheritance, or at interest," or "in land or some other securities," as they shall think most fit and proper; yet if the limitations are adapted only to real estates, so as to manifest the testator's intention that land shall be purchased, the money must be considered as land, although it be not actually so invested by the trustees: *Cowley v. Hartstonge*, 1 Dow, 361; *Cookson v. Reay*, 5 Beav. 22, 12 C. & F. 120; *Johnson v. Arnold*, 1 Ves. 169. See also Sugd. Prop. 462.

In *Earlom v. Saunders*, Amb. 241, W. P. devised lands to trustees and their heirs, to the use of his wife for life, remainder to his first and other sons in tail, remainder to Widdrington Powell and William Powell, in fee, as tenants in common. And he directed, that 400*l.* should be raised by his executrix out of his personal estate, and paid by her to his trustees, or one of them, who should lay out the same in a purchase of lands, or any other security or securities, as they should think proper and convenient; and he directed that the lands so to be purchased, and the security or securities on which the 400*l.* should be so laid out, should be made to, and settled on, the trustees, their heirs and assigns, in trust and to the use of his wife for life, and after her decease, to such uses, and under such provisions, conditions, and limitations, as his lands before devised were limited. Lord Hardwicke held, that conversion was not at the election of the trustees. "This Court," said his Lordship, "never admits trustees to have such election, to change the right, unless it is expressly given to them. Here the money is to be laid out in land or securities, for such uses as the land is before settled. If it is laid out in securities (which are personal), all the limitations might not take place; for if there was a son born, he would take the whole money, as being tenant in tail, and the subsequent limitations would be defeated. The only way to make the clause consistent is, that the money be laid

out on securities till lands are purchased, and the interest and dividends, in the meantime, to go to such persons as would be entitled to the land." See also, *Edwards v. Countess of Warwick*, 2 P. Wms. 171; sed vide *Atwell v. Atwell*, 13 L. R. Eq. 23.

Where conversion is to take place at the request of certain persons, if the words of request are merely inserted for the purpose of enforcing the obligation to convert, although a conversion has taken place without consent, it will be considered to have been properly made. Thus, where the limitations are *only adapted to real estate*, a direction to lay *out money *after the request* of persons, in the purchase of lands, [*849] will be construed as imperative, although no request may have been made, and there is a declaration, that *until* the purchase should be made, the money should be placed out on securities, and a disposition of the dividends and interest in the meantime, to the same persons to whom the rents and profits of the estates to be purchased would go. See *Thornton v. Hawley*, 10 Ves. 129, where Sir W. Grant, M. R., observes, in reference to the force of the words "after request:" "Nothing is more common than to direct money to be laid out upon request. The object of that is, only to insure that the act shall be done when the request is made—not to prevent it until request." See, also, the judgment of Hutchins, Lord Commissioner, in *Symons v. Rutter*, 2 Vern. 227, approved of by Lord Thurlow, in *Pulteney v. Darlington*, 1 Bro. C. C. 238, and in *Lechmere v. The Earl of Carlisle*, 3 P. Wms. 219. Sir J. Jekyll, M. R., in reference to *Symons v. Rutter*, says, "In this last case, I observe, it was admitted, that if there had not been the clause in the articles, that the purchase should be made with the consent of the husband and wife, it must have been taken as land. Now such clause makes no manner of difference; for upon a convenient purchase being proposed, the Court would have taken on themselves to judge thereof, and, without some reasonable objection made, would have ordered the money to be laid out in it; so that such clause seems to have been immaterial in the marriage articles, and as if omitted, and the opinion of Hutchins to have been well grounded:" sed vide *Stead v. Newdigate*, 2 Mer. 530.

Where, however, words requiring the request or consent of parties to a sale are inserted for the purpose of giving a discretion to them, if the sale takes place without their request or consent, the proceeds of the sale will still be considered as land. Thus in *Davies v. Goodhew*, 6 Sim. 585, the sale was to be "with the joint consent and approbation of the husband and wife, and *not without*;" conversion, therefore, in that case, was held to be not imperative, but at the option of the husband and wife. See also *In re Taylor's Settlement*, 9 Hare, 596.

Where there was a mere discretionary power to convert real property into personalty, and to distribute it amongst a class, and the trustees died after having made only a partial conversion, the discretionary

power having been extinguished by their deaths, it was held, that the class, or their representatives, must take the respective estates as they found them: *Walter v. Maunde*, 19 Ves. 424; *Rich v. Whitfield*, 2 L.

R. *Eq. 283. And see *Shipperdson v. Tower*, 1 Y. & C. C. [*850] C. 441.

The result will be different where the power is imperative, and in the nature of a trust. Thus, in *Grieveson v. Kirsopp*, 2 Keen, 653, where a testator gave to his widow, "for the benefit and advantage of his children," power of selling his W. estate, and by a codicil, he expressed himself in effect thus: "I do empower my wife to sell all my estates whatsoever, and the money arising from such sale, together with my personal estates, she my said wife shall and may divide and proportion among my said children, as she shall think fit and proper, or as she shall direct by will." The widow died without having sold or appointed the estate. It was held, by Lord Langdale, M. R., that the power was in the nature of a trust for the children, and that, subject to such appointment as the widow might have made, the children were entitled in equal shares; and that the direction to sell, expressed as it was, operated as a conversion of the real estate, and that the children were entitled to take the money to arise from the sale as personalty. See also *Burrell v. Baskerfield*, 11 Beav. 525.

The conversion of land into money may be implied without any express words directing a sale. (See *Mower v. Orr*, 7 Hare, 475.) But in order to effect such conversion the intention must be clear. *Cornick v. Pearce*, Ib. 477; see also *Greenway v. Greenway*, 1 Giff. 131.

Under the general Stamp Act (55 Geo. 3, c. 184, Sched. part 3), "money to arise from the sale, mortgage, or other disposition, of any real or heritable estate directed to be sold, mortgaged, or otherwise disposed of," is liable to the payment of legacy duty. The question often, then, arises, whether the direction for conversion is absolute and imperative, or merely optional; for in the former case, the real estate is liable to the payment of legacy duty, even though it be not sold, in consequence of the person absolutely entitled, electing to take it, instead of the proceeds to arise from a sale: *Attorney-General v. Holford*, 1 Price, 426; *Advocate-General v. Ramsey's Trustees*, 2 Cr. M. & R. 224, n.; *Williamson v. The Advocate-General*, 10 C. & F. 1; while in the latter case it is clear, if the trustees, in the exercise of their discretion, leave the land unsold, the legacy duty will not attach: though it has been held, that it will if the trustees, in the exercise of such discretion, sell: *Attorney-General v. Mangles*, 5 M. & W. 120; and see *Attorney-General v. Simcox*, 1 Exch. Rep. 749. However, notwithstanding those cases, it seems doubtful whether the liability to the duty should depend upon any act of the trustees: *In re Evans*, 2 Cr. M. & R. 206; and see cases cited, 10 C. & F. 14; *and *Advocate-General v. Smith*, 1 Macq. H. L. Cas. 76. Now see the 16 & 17 Vict. c. 51 (The Succession Duty Act), s. 29.

Although there is a power to sell, and a sale takes place, if it is effected, not under the power, but under the jurisdiction of the Court of Chancery, legacy duty will not be payable. Thus when a will empowered trustees, with the consent of A., to sell real estate, and to invest a sufficient sum to answer two annuities; the rents being deficient to pay the annuities, the Court ordered a sale, and out of the produce, 20,000*l.* consols were purchased to provide for the annuities. Legacy duty being claimed, on the corpus of the consols, it was held by Sir J. Romilly, M. R., that the validity of the claim depended on the determination of the question, whether the sale had taken place under the general jurisdiction of the Court, or under the power in the will, and his Honor being of opinion that it took place under the jurisdiction of the court, that no legacy duty was payable. *Hobson v. Neale*, 17 Beav. 178.

And where trustees having a power of sale are directed to invest the proceeds "in the purchase or on mortgage" of other lands (*Mules v. Jennings*, 8 Exch. 830), and a fortiori, where they are simply directed to invest the proceeds in the purchase of real estate (*Heal v. Knight*, 8 Exch. 839, n.), the legacy duty will not attach, although a sale may have taken place, and the person beneficially entitled has elected to take the money in preference to its being invested in the purchase of land. "The Crown," observed Alderson, B., "has no claim except where the money is handed over to a party *by force of the will of the testator*, not where the money is handed over under an arrangement in which the will of the devisee and the testator co-operate;" *Mules v. Jennings*, 8 Exch. 830.

It is clear that the proceeds of real estate which a testator by his will directs to be sold and distributed as personalty will not be liable to probate duty. Hanson on Prob. Leg. and Succ. Duty Acts, p. 188, 2nd ed. And it is the same where the direction to sell is contained, not in a will, but in a previous deed, if the direction is capable of being revoked or varied, and is not in fact carried into execution until after the owner's death. Thus, in *Matson v. Swift*, 8 Beav. 368, J. Swift conveyed fee simple estates to trustees upon trust by mortgage, sale, lease, or other disposition of the estates to pay certain debts, and the residue to himself, *his executors, administrators, and assigns, and that without any claim or equity thereon, by or in favour of his heir or real representatives*, notwithstanding the estates, or any part thereof, might remain unconverted at the time of his death. J. Swift died leaving a *will. The estate was sold after his death. It was held by Lord [*852] Langdale, M. R., that no part of the produce was liable to probate duty. "In the present case," said his Lordship, "an actual conversion was required, and has, accordingly, been made since the testator's death, and I am of opinion that the Crown is not entitled to any benefit from the conversion so made, and that the interest of the deceased in the property was not subject to the probate duty, because, in

fact, the interest of the deceased existed in the form of an equitable interest in land of inheritance, and not in the form of personal estate, in which form alone the administration of it could be granted by the probate."

And where a testator enters into a binding contract to sell land, and dies without receiving all the purchase-money, such part of it as is received by his executors is liable to probate duty, because it was received by them as part of the testator's personal estate. *The Attorney-General v. Brunning*, 8 Ho. Lo. Ca. 243, reversing the decision of the Court of Exchequer, reported 4 Hurlst. & N. 94.

The question as to whether land is converted so as to be liable to legacy duty is not now of so much importance as it was formerly, as real estate is now liable to succession duty: 16 & 17 Vict. c. 51.

Legacy duty, however, as has been before shown, is, it seems, now payable on real estate notionally converted into personalty in equity, in consequence of its having been purchased with partnership capital, and used for partnership purposes in trade. See *Forbes v. Steven*, 10 L. R. Eq. 178, overruling what was supposed to be decided in *Custance v. Bradshaw*, 4 Hare, 315.

Of the period from which conversion will be considered to commence.]—Where absolute conversion is directed to be made by deed, if no time for it be pointed out, it will take place from the delivery of the deed (*Griffiths v. Ricketts*, 7 Hare, 299; *Clarke v. Frankling*, 4 K. & J. 257); and in the case of a will it will take place from the death of testator (*Beauclerk v. Mead*, 2 Atk. 167; see *Ward v. Arch*, 15 Sim. 389), even although there may be a direction that a sale should take place "when-ever it should appear advantageous;" *Robinson v. Robinson*, 19 Beav. 495.

The conversion may be made by the owner to depend upon the option of third parties; as, for instance, trustees.

So, likewise, it may be made to depend upon the option to purchase at a future time. Thus in the leading case of *Lawes v. Bennett*, 1 Cox, 167, a person named Witterwronge, in 1758, demised a farm to Douglas for seven years, and there was an agreement endorsed upon the lease, that if Douglas should, before the 29th of Sept. 1765, give notice in writing of his wish to purchase the inheritance of the premises for 3000*l.*, Witterwronge agreed to sell and to execute to him a proper conveyance thereof. Witterwronge died in 1763, having by his will devised all his real estates to the defendant Bennett, and all his personal estate to the plaintiff, Mary, the sister of the defendant Bennett, equally as tenants in common. In 1762, Douglas assigned the lease, and the benefit of the agreement to Waller, and on the 2nd of February, 1765, Waller called upon Bennett to perform the contract entered into by Witterwronge, for the sale of the premises for 3000*l.*, and he accordingly executed a conveyance to Waller in fee. Bennett

having died, a bill was filed by Lawes, the husband of Bennett's sister, against the personal representative of Bennett, claiming a moiety of the 3000*l.* and interest, and Sir Lloyd Kenyon, M. R., decreed accordingly. "It is very clear," observed his Honor, "that if a man seised of a real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is, that it is left to the election of Douglas whether it shall be real or personal. It seems to me to make no distinction at all. Suppose a man should bargain for the sale of timber, provided the buyer should give proper security for the payment of the money. This when cut down would be part of the personal estate, although it depends upon the buyer whether he give security or not; when the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal at a future period. . . . I must, therefore, declare this 3000*l.* to be part of the personal estate of the testator, and that the plaintiffs are entitled to one moiety thereof."

Until, however, in such a case the option to purchase is exercised, the rents and profits will go to the persons who were entitled to the property up to that time, as real estate. Thus in *Townley v. Bedwell*, 14 Ves. 591; the testator in the cause granted a lease to Townley for thirty-three years, with a proviso that "if Townley, his executors, administrators, or assigns, should be desirous to purchase the premises within six years, he, his executors, administrators, or assigns, should pay to the testator, his heirs or assigns, 600*l.* for the purchase, upon having a good title made to him Townley, his executors, administrators, or assigns." The testator died without having devised the premises; and before the expiration of the lease, Townley *declared his option to purchase according to the proviso. It was held by Lord [*854] Eldon, C. (though evidently with some reluctance), upon the authority of *Lawes v. Bennett*, that from the time of the option, Townley was entitled to the premises, and that he should pay interest upon the purchase-money, which money and interest he held to be personal estate of the testator, and which ought to go to his next of kin, but that the rents of the premises, until the option, belonged to the heir. So in *Ex parte Hardy*, 30. Beav. 206, a testator gave to his children in succession the option of purchasing his real estate, and in the meanwhile the rents were to be equally divided between them. Before an option had been exercised, and while some of the children were still infants, a corporation purchased part of the property for public improvements under compulsory parliamentary powers. It was held by Sir John Romilly, M. R., that the shares of the children who had died infants remained real estate until the option had been exercised, and that, in the meanwhile, the income of the purchase-money belonged to their heir-at-law. See also *Collingwood v. Row*, 3 Jur. N. S. 785, 5 W.

R. 484, V. C. K.; *Goold v. Teague*, 7 W. R. (V. C. W.) 84; *Weeding v. Weeding*, 1 J. & H. 424; *Woods v. Hyde*, 10 W. R. (V. C. W.) 339; sed vide, *Drant v. Vause*, 1 Y. & C. C. C. 580; and *Emuss v. Smith*, 2 De G. & Sm. 722, where it was held by Sir J. L. Knight Bruce, V. C., that a specific devise by name of the property, subject to the option, carried to the devisee the purchase-money also when the option was exercised; and when, in the instrument by which the option is given, there is a direction that the purchase-money is to be paid to the person who is then owner of the estate, he alone will be entitled to it. See in *Re Graves v. Minors*, 15 Ir. Ch. Rep. 357, and the remarks of the Master of the Rolls on *In Re Crofton*, 1 Ir. Eq. Rep. 204.

The question may arise, which was suggested arguendo in *Lawes v. Bennett*, (1 Cox, 170), if the person having the option to purchase, should release such option to the heir or devisee, whether a court of equity could afford any relief. There does not appear to be any express decision upon the point, but Sir Lloyd Kenyon, M. R., in his judgment said he thought that a court of equity would give relief, "if it appeared to be done collusively to oust the legatee of his personal estate."

Where a person has an option given to him of purchasing land at a fixed price, and the land is purchased for a larger sum by a company under parliamentary powers before the time for exercising the option arrives, the person having the option will be entitled to the difference between the price fixed for him and the sum given by the railway company. In *Re Cant's Estate*, 4 De G. & Jo. 503, reversing *S. C.*, 1 Giff. 12.

As to conversion in certain cases by the Court or third parties independently of contract or will.—With regard to the real estate of a bankrupt, vested in his assignees for payment of his creditors, it is clear that if any of it remain unsold before the death of the bankrupt, and the creditors have been fully satisfied, it will go, in case of intestacy, to his heir-at-law. *Bromley v. Goodere*, 1 Atk. 75. So in the case of real estate conveyed to trustees for the benefit of creditors, which remains unsold. *Clissold v. Cork*, 27 L. T. R. (N. S.) 143, W. R. (V. C. W.) 796.

Should the real estate of the bankrupt be sold or contracted to be sold in his lifetime, it will be considered as converted, and upon his death intestate, his heir-at-law will not be entitled to it, though he will be so, if the sale or contract for sale be entered into after the death of the bankrupt. Thus in *Banks v. Scott*, 5 Madd. 493, parts of the real estate of the bankrupt Scott were sold during his life; parts were contracted to be sold, but not sold at the time of his death, and the remainder was sold after his death, and a surplus remained in the hands of his assignees. It was held by Sir John Leach, V. C., that the heir of Scott, as such, had no claim in respect of the estates sold or con-

tracted to be sold in the lifetime of Scott, but that he was entitled to the overplus, after payment of creditors arising from the estates sold after the death of the bankrupt. "As to the real estates," said his Honor, "sold or contracted to be sold, during the life of the bankrupt Scott, it must at his death be considered as converted into personalty; but as to the real estate which was unsold and uncontracted for at the death of the bankrupt, it is to be considered as descending to his heir, subject to the charge created by provisions of the bankrupt laws for the payment of his debts. It can make no difference in principle, whether such a charge be created by provision of the law, or the provision of the party. As far as the real estate is not exhausted by that charge, it is the property of the heir."

A wrongful conversion of property by trustees will not affect the interests of the cestui que trusts. Thus, if real property be wrongfully converted into personalty, or personalty into realty, each property so converted will be considered to retain its original character.

When, however, conversion takes place by the direction of a court of competent jurisdiction in Lunacy or Chancery, the result, as will be hereafter seen, is different from the case where conversion is wrongfully made by a trustee; and as there are no equities between the heir-at-law and the next of kin, they will take the properties to which they are respectively entitled according to *the character in which they* [*856] find them.

In the case of a lunatic, the Court will not in general alter the state of a lunatic's property so as to affect his successors; it will, however, do so when it is for the benefit of the lunatic himself; and in dealing with the property of a lunatic this principle is continually borne in mind by the Court.

This is well laid down by Lord Loughborough, in the leading case of *Oxenden v. Lord Compton*, 2 Ves. jun. 72. "In the series of orders," says his Lordship, "made by persons charged with the custody of lunatics there is one general principle, though I do not say it is without some possible deviation, that the general object of the attention of the administrator is *solely and entirely the interest of the lunatic himself*, and with regard to the management of the estate, solely and entirely the interest of the owner, without looking to the interests of those who, upon his death, may have an eventual right of succession, and nothing could be more dangerous or mischievous than for him to consider how it would affect the successors. There will always be among them an emulation of each other; and their speculations, if the administrator was to engage in them, would mislead his attention and confine his observation as to the interest of the only person he is bound to take care of. The next of kin would contend for a short allowance. The heir would have no interest to contend for a short allowance out of the rents and profits, but might have an emulation against the next of kin;

and, therefore, where the next of kin would contend for a narrow allowance, the heir would insist on a large one. Therefore the Court have always shut out of their view all consideration of eventual interests, and consider only the immediate interest of the person under their care. If the interests of succession were to be respected by the Court, I should expect not only precedents, but a continued course of accounting, that would manifest it to be the object of the attention of the Chancellor. There would be a continued running account between the personal and real estates."

Acting upon this principle, if an application were made to sell a part of the real estate of a lunatic for the payment of debts, if the Court found that the maintenance of the lunatic would be better provided for, and his advantage promoted, by disposing of a real estate, inconvenient and ill-conditioned, and that it would be for the benefit of the lunatic so to pay the debts, and keep together the personal estate, the Court would have no difficulty in making an order upon such an application: per Lord Eldon, in *Ex parte Phillips*, 19 Ves. 124.

[*857] *So a case has occurred of a lunatic, seised *ex parte paternâ* of estate A., and *ex parte maternâ* of estate B., the latter being subject to a mortgage; and timber cut upon A. having been applied in discharge of the mortgage upon B., it was on a question between the heirs held that A. was not to be recouped, per Lord Eldon, C., in *Ex parte Phillips*, 19 Ves. 123, 124. See, however, *Re Leeming*, 7 Jur. N. S. 115; 3 De G. F. & Jo. 43.

So timber may be ordered to be cut on a lunatic's estate, and applied in payment of debts or redemption of the land tax (*Ex parte Bromfield*, 1 Ves. jun. 455, 457; *Bevan's case*, cited 1 Ves. jun. 455, 457; *Ex parte Phillips*, 19 Ves. 118.)

And the produce of timber cut and sold by the order of the Court on a lunatic's estate, although it may not be wanted for any particular purpose, will be considered on his death as part of his personal assets: *Ex parte Bromfield*, 1 Ves. jun. 453; *S. C.*, 3 Bro. C. C. 510; *Oxenden v. Compton*, 2 Ves. jun. 69; *S. C.*, 4 Bro. C. C. 231; *Ex parte Phillips*, 19 Ves. 118, overruling the dictum of Lord Hardwicke in *Marquis of Anandale v. Marchioness of Anandale*, 2 Ves. 384.

In like manner, where it is for his benefit, the personal estate of a lunatic will be laid out by the Court on necessary expenses of his real estate, such as for repairs (*Sergeson v. Sealey*, 2 Atk. 414; *Ex parte Grimstone*, Amb. 708; *S. C.*, cited 4 Bro. C. C. 235, n., 2 Ves. jun. 74; *In re Badcock*, 4 My. & Cr. 440), for renewals of leaseholds, or admissions to copyholds (*Ex parte Grimstone*, 2 Ves. jun. 75, n.: but see *Degg's case*, cited 4 Bro. C. C. 235, n.), or in improvements (*Ex parte Grimstone*, cited 2 Ves. jun. 75, n.), or in such an outlay as the erection of a fire engine in a colliery (*Oxenden v. Compton*, 2 Ves. jun. 73).

In some cases it has been held that where a mortgage on the lunatic's real estate has been paid out of his personal estate, the next of kin had no claim as against the real estate for the amount expended in its exoneration (*Ex parte Grimstone*, Amb. 706; *S. C.*, 4 Bro. C. C. 235, cited); in more recent cases the claim of the next of kin has been upheld. See *Weld v. Tew*, Beatt. 272; *Re Leeming*, 7 Jur. N. S. 115; 3 De G. F. & Jo. 43.

The Court, however, in the exercise of its discretion in the management of a lunatic's estate, will not lightly, or when it is uncalled for, and even it is said only upon pressing occasions, change one species of property into another: *Ex parte Bromfield*, 1 Ves. jun. 463, 3 Bro. C. C. 515; *Oxenden v. Compton*, 2 Ves. jun. 76, 4 Bro. C. C. 234. The Court will not do anything extraordinary *with the property [*858] of the lunatic, avoiding all alterations of it so far as is consistent with the idea of preserving the interest of the proprietor. Thus the Court will not ordinarily buy or sell estates: *Oxenden v. Compton*, 2 Ves. jun. 73; *Ex parte Grimstone*, cited 4 Bro. C. C. 235, n.; *Sergeon v. Sealey*, 2 Atk. 414.

If, however, the committees of a lunatic took upon themselves without leave of the Court for their own advantage to change the property of the lunatic, they would not be allowed to take advantage of their own wrong. Thus in *Ex parte Ludlow*, 2 Atk. 407, the committees of a lunatic's estate, *who were entitled to it themselves after his death*, laid out 25*l.* in buying timber for the repairs of barns, rather than take it from the estate, notwithstanding there was timber upon it proper for that purpose, Lord Hardwicke, C., held the committee liable to refund the 25*l.* to the personal estate. "I am of opinion," said his Lordship, "that committees of the real estate of a lunatic may exercise the same power over it in regard to cutting timber for repairs, as any discreet person who was the absolute owner might do. And, therefore, the committees of this estate must make good the sum of 25*l.* to the personal estate, for they appear to me to have done this merely with regard to their own interest, as the reversion of the real estate belongs to them." And see *Ex parte Bromfield*, 1 Ves. 462; *Anon.*, 2 Freem. 114; *Awdley v. Awdley*, 2 Vern. 192; so in the case of *In re Badcock*, 4 My. & Cr. 440, Lord Cottenham, said—"that if money belonging to a lunatic were laid out in the purchase of land, or what would amount to the same thing, in building a farm-house, it would be right that the sum so laid out should retain its character of personalty."

It seems, however, that if timber has been cut down on a lunatic's estate by a stranger tortiously, inasmuch as there has been no abuse of confidence, and the heir has no equity against the personal representatives, the timber or its proceeds will not be restored to the heir-at-law: *Ex parte Bromfield*, 1 Ves. jun. 463, 3 Bro. C. C. 515.

As to the surplus monies arising from the disposition of land be-

longing to lunatics, see 16 & 17 Vict. c. 70, s. 119. See also *In re Wharton*, 5 De G. Mac. & G. 33; *Jones v. Green*, 5 L. R. Eq. 555.

As to the jurisdiction of the Lord Chancellor to order the sale of the property of a lunatic not found such by inquisition when it does not exceed 1000*l.* in value, or the income thereof, 50*l.* a year, see 25 & 26 Vict. c. 86, ss. 12 & 13.

With regard to the conversion of the property of infants, Lord Thurlow in one case said that "he could not distinguish between [*859] *lunatics and infants:" *Ex parte Bromfield*, 1 Ves. jun. 461, 3 Bro. C. C. 515.

However, until the passing of the Wills Act, this distinction existed between an adult lunatic and an infant, an adult lunatic on his recovery always had, though by different modes, the same power of disposition both over his real and personal property; to convert, therefore, one species of property into another, would not injure the lunatic. An infant, however, before the passing of the Wills Act, might dispose of personal estate before he attained the age of twenty-one, but he could not devise real estate before he attained that age. The Court, therefore, would not convert his personalty into realty, because that would deprive him of a power of disposition which the law gave to him over personalty; nor would it convert realty into personalty, because by so doing a power would have been conferred upon him contrary to the policy of the law. Lord Eldon thus lays down the law on this subject—"In the case of an infant it is settled, that as a trustee out of court cannot change the nature of the property, so the Court, which is only a trustee, must act as a trustee out of court; and finding that a change will be for the benefit of the infant, must so deal with it as not to affect the powers of an infant over his property even during his infancy; when he has powers over one species of property and not over the other. It may be for the benefit of an infant in many cases, that money should be laid out in 'land, if he should live to become adult; but if not, it is a great prejudice to him, taking away his dominion by the power of disposition he has over personal estate so long before he has it over real estate. The Court, therefore, with reference to his situation even during infancy, as to his powers over property, works the change, not to all intents and purposes, but with this qualification that if he lives he may take it as real estate, but without prejudice to his right over it during infancy as personal property:" *Ex parte Phillips*, 19 Ves. 122; and see *Witter v. Witter*, 3 P. Wms. 99; *Rook v. Worth*, 1 Ves. 461; *Sergeson v. Sealey*, 2 Atk. 413; *Ashburton v. Ashburton*, 6 Ves. 6; *Ware v. Polhill*, 11 Ves. 278; sed vide *Earl of Winchelsea v. Norcliffe*, 1 Vern. 435; *Inwood v. Twyne*, 2 Eden, 152.

Accordingly, it has been held that except in the case of *necessary expenses*, such as for repairs (*Ex parte Grimstone*, 4 Bro. C. C. note 235), keeping up a house (*Ex parte Grimstone*, Amb. 708), paying for an

estate devised to an infant in consideration of his paying the purchase-money (*Vernon v. Vernon*, cited 1 Ves. jun. 456), for which purposes the infant's personalty has been held to be applicable, no conversion of his property *from one species to another would be allowed. [*860]

Thus the proceeds of timber cut on the estate of an infant would, it seems, be considered as part of the realty, and descend to the heir: *Tullit v. Tullit*, Amb. 370, 1 Dick. 322; *Ex parte Phillips*, 19 Ves. 124; sed vide *Ex parte Bromfield*, 3 Bro. C. C. 516.

A distinction was taken in the case of *Mason v. Mason*, cited Amb. 371, between the case of timber cut on the estate of an infant seised in tail, and an infant seised in fee, inasmuch as in the latter case the timber being taken as realty went to the infant absolutely, whereas, in the former case, if it were taken as realty, it might go to the remainderman, and it ought therefore to be taken as personalty. And Sir Thomas Clarke, M. R., in a subsequent case, allowed of the distinction as taken in *Mason v. Mason*. See *Tullit v. Tullit*, Amb. 371.

Moreover, where the personal estate of the infant has been applied in paying off a charge or redeeming a mortgage, it has been ordered that it shall be considered as personal estate for the benefit of the infant. See *Ex parte Bromfield*, 3 Bro. C. C. 516; *Seys v. Price*, 9 Mod. 220; *Tullet v. Tullet*, 1 Dick. 323; sed vide *Ex parte Grimstone*, Amb. 708; *Zoach v. Lloyd*, cited 2 Vern. 192; *Dennis v. Badd*, cited Ib. 193; and see *Earl of Winchelsea v. Norcliffe*, 1 Vern. 436. Lord Eldon, in a well-known case, says, "I have uniformly made it a rule, since I have sat here, where property of one nature has been applied for the benefit of an infant to property of another nature, to have an express provision, that if he shall not attain the age at which he shall have a disposable power, the representative shall not be prejudiced in any degree by the act done by the Court in contemplation of the infant's benefit in all the circumstances surprise or accident can throw round it:" *Ware v. Polhill*, 11 Ves. 278.

Even if the Court forgets to make such declaration the law is the same, and it is a matter of course to reform the order, because, says Lord Eldon, "The order does not create the right, but is a declaration of a pre-existing right so to have the property secured:" *Ware v. Polhill*, 11 Ves. 278.

Although in the case of descendible freeholds the line of descent may be altered, by the act of a guardian of the infant, as by the renewal of a lease for lives of which the infant is seised *ex parte maternâ*, the new lease being considered as a new acquisition, and vesting in the infant as a purchaser, will descend to the heirs *ex parte paternâ*, for it is immaterial to the infant which of the heirs takes it. And it was said by Lord Hardwicke, C., "to be not like the case of an infant's

[*861] personal estate turned into real; *for the reason of that being still considered as personal estate, is, because of the different ages at which the infant might dispose of his personal, and his real estate, and not out of favour to any one representative more than another:" *Pierson v. Shore*, 1 Atk. 480, 481.

By the Wills Act, 1 Vict. c. 26, an infant has no more power by will over personal estate than over real estate; the reason, therefore, for the distinction, running through the decisions, between the conversion of the property of infants and lunatics, no longer exists; and it would seem, therefore, that where the Court for the benefit of an infant converts property of one description into property of another description, that, as in the case of the property of lunatics similarly converted, it ought to go to the heir-at-law or next of kin, according to its character at the death of the infant.

In the recent case of *Dyer v. Dyer*, 34 Beav. 504, timber which was deteriorating was cut by order of the Court, and for the benefit of the estate, on the property of an infant, who was equitable tenant in fee, subject to an executory devise over in the event of his dying under twenty-one without issue. He afterwards died under twenty-one without issue. It was held by Sir John Romilly, M. R., that the proceeds of the sale of the timber were the personal estate of the infant. "If," said his Honor, "the Court in administering the real estate of an infant, finds that it would be for his benefit to cut the timber, the produce belongs to him as personal estate, and the Court does not consider whether, if he dies in his infancy, his heir-at-law or next of kin would take it; but it simply directs the timber to be felled for the benefit of the person who is then the owner of the fee simple. Thereby so much of the realty is converted into personalty; not when the order is made, but at the time when the timber is severed. In my opinion, the fact of this young man having died before he attained twenty-one, no more alters the character of the timber or of the money derived from it, than if he had died two or three days after attaining twenty-one; nor does the fact that there is an executory devise over, in the event of his dying under twenty-one without issue make any difference. Now let us see if the cases are not consistent with this. In *Oxenden v. Lord Compton* (2 Ves. jun. 69), the Court in dealing with the estate of a lunatic, cut timber during his life. When it was severed it became personalty, and on the death of the lunatic as personalty went to his next of kin, and not to his heir-at-law."

In this case it will be observed that the Master of the Rolls makes no distinction between timber felled by the order of the *Court [*862] on the estate of an infant, and timber felled on the estate of a lunatic. This point, however, does not, according to the reports referred to, appear to have been argued before him.

Where, however, during the life of a person having a limited interest,

timber is directed to be cut on a settled estate, the proceeds of the timber will be considered as realty until some person absolutely entitled thereto elects to take them as personalty. Thus, in the case of *Field v. Brown*, 27 Beav. 90, a lady was tenant for life of an estate with remainder to her first and other sons in tail, with remainder to her brother for life, with ultimate reversion to him in fee. The timber, which was deteriorating, was, by order of the Court in a suit for administration of the estate, cut down, and the proceeds directed to be invested, and the dividends paid to her for life, with liberty to apply on her death. Her brother dying before her, the ultimate limitation became vested in her. It was held by Sir John Romilly, M. R., that as between the heir and executor of the lady the timber-money was realty, and belonged to the heir. "No doubt," said his Honor, "where there is an estate for life, with remainder to A. in fee, something may happen in the life of A. which may turn part of the inheritance into a chattel interest. I do not dispute that proposition; but it is not so where the Court, merely for the benefit of the estate, sells a part of the inheritance; that was exactly the case here, when it directed a part of the timber to be cut down and sold for the benefit of the several persons who were or might become owners of the estate. . . . It was said that the first estate of inheritance was vested in the brother, and that, therefore, he was absolutely entitled to the timber-money. If that were so, and she had had a child immediately after, the effect would have been to deprive him of a portion of the estate in which such child would then have the first estate of inheritance. If the eldest child had died an infant before the tenant for life, would the interest of the timber-money vest in that child, or would it not pass on to the next child? It is clear that the person in whom it vested was the person absolutely entitled to the inheritance at the time when the estate of the tenant for life fell in. . . . I entertain no doubt that this timber-money, in the view of this Court, vested in this lady in fee simple, and of the nature of real estate; and assuming nothing to have been done to convert it into personalty, in the meantime, that it remained so at her death."

Where a mortgage deed of freehold estate contains a power of sale, with a direction that the surplus monies to arise from the sale *shall be paid to the mortgagor, *his executors or administrators*, if the estate is sold by the mortgagee in the *lifetime* of the [*863] mortgagor, then the surplus monies will be the personal estate of the mortgagor; but if the estate be unsold at the death of the mortgagor, the equity of redemption devolves upon his heir or devisee; if a sale should subsequently take place, the heir or devisee, as the case may be, will be entitled to the surplus produce: *Wright v. Rose*, 2 S. & S. 323, 324. See also *Bourne v. Bourne*, 2 Hare, 35, ante, p. 846; *In re Smith's Mortgage Account*, 9 W. R. (M. R.) 799.

In the case of *In re Underwood*, 3 K. & J. 745, where, in considera-

tion of money lent, real estate was conveyed to the lender, his heirs and assigns, upon trust, in case the principal money and interest should be repaid by a given day, for the borrower his heirs or assigns; but in case default should be made, then upon trusts for sale, and the trusts of the purchase-money were declared to be for the payment of the principal money, interest and costs, and subject thereto for the borrower, "*his executors, administrators or assigns*," default having been made, it was held that the trust of the surplus being for the borrower, "*his executors, administrators or assigns*," and not for him, "*his heirs or assigns*," the deed operated to convert the property as between his real and personal representatives. It was therefore more than "merely a security for money"—more, that is, than "a mortgage," as defined by the 2nd section of the Trustee Act, 1850; it was a deed of trust within the meaning of the 15th section of that Act; and the lender having died intestate, and it being impossible to find his heir, the Court had power to make a vesting order under that section.

Where under a decree of the Court more real estate is sold than is necessary for payment of mortgage or other debts, the surplus will still retain the character of realty. See *Cooke v. Dealey*, 22 Beav. 196. There an estate was devised to a married woman, subject to the payment of the testator's debts. The estates were afterwards sold under a decree in an administration suit to which the devisee was a party. After payment of debts there remained a sum in court. On the death of the devisee, it was held by Sir John Romilly, M. R., that the heir-at-law of the devisee, and not her husband, was entitled to the sum in court. "More of the real estate," said his Honor, "was sold than necessary; of course the conversion is complete to the extent to which the purchase-money was required for the particular object for which the sale took place, namely, for the payment of the debts and costs, but the excess, though in the form of money, remained as before impressed *with the character of land. The money was raised by [*864] sale instead of by mortgage, and for the convenience of the purchaser too much was sold; the excess, therefore, beyond what was required, retains its original character of realty. . . . I am, therefore, of opinion, that all the money not required for the purpose of the suit, and not disposed of in the performance of the order and decree of the Court belongs to the parties in its original character, that is, it remains real estate, and goes to the heir-at-law." See, also, *Jermyn v. Preston*, 13 Sim. 356, 366; and *Lancaster v. Evors*, 1 Ph. 349. The case of *Flanagan v. Flanagan*, cited in the principal case (ante, p. 830), seems to have turned upon the terms of the decree for payment. And see *Johnson v. Webster*, 4 De G. Mac. & G. 484; *Dyer v. Dyer*, 34 Beav. 504.

Where money is paid into court, the produce of real estate converted by compulsory powers under acts of parliament, it in general

remains in court subject to the rights of the parties interested in it to have it reinvested in land, and it is to be considered as money or personal estate in court, subject to a trust to be invested in land, and therefore impressed with the quality of real estate. (*In re Stewart*, 1 Sm. & G. 32, 39; *The Midland Counties Railway Company v. Oswin*, 1 Coll. 80; *In re Taylor's Settlement*, 9 Hare, 596) until some act is done by the owner showing his election to take it as personalty. *In re Horner's Estate*, 5 De G. & Sm. 483; *In re Stewart*, 1 Sm. & Giff. 39.

The question frequently arises when land has been taken by companies under the Lands Clauses Consolidation Act, as to whether the money arising from the sale is to be considered as land or money; with reference to this subject it has been recently laid down, that, "where the circumstances of the case have brought it under the 69th section of the Lands Clauses Consolidation Act, the money has been held to bear the character of realty; but if, on the other hand, the circumstances have brought the case under the 78th section of the Lands Clauses Consolidation Act, then the money has been held personalty." Per Kindersley, V. C., 3 Drew. 733.

Where land had been taken by a company under the Lands Clauses Consolidation Act, from a person who was, and continued until his death, in a state of mental imbecility, *but was not the subject of a commission of lunacy*, and the money was paid into court, it was held by Lord Cranworth, V. C., after the death of the landowner, that the money was not to be reinvested in or considered as land, but to be paid to his personal representatives: his Lordship being of opinion, that the money ought to be treated "as being paid in by a party seised in fee and competent to sell." See *Ex parte Flamank*, [*865] 1 Sim. N. S. 260.

The case of *The Midland Counties Railway Company v. Oswin*, 1 Coll. 80, may at first sight appear to conflict with the judgment of Lord Cranworth, in *Ex parte Flamank*; but as his Lordship there clearly points out, the decision in the former case turns upon the construction of the particular terms of a local Act.

As to the question of conversion arising upon the construction of local Acts, *Shard v. Shard*, 14 Ves. 348; see *Cramer's case*, 1 Sm. & G. 32; *In re Taylor's Settlement*, 9 Hare, 596; *Midland Counties Railway Company v. Oswin*, 1 Coll. 80; *In re Harrop*, 3 Drew. 726; *In re Robertson*, 3 Jur. N. S. 784; *Dixie v. Wright*, 32 Beav. 662; *Re Skegg's Settlement*, 2 De G. Jo. & Sm. 533; *Cadman v. Cadman*, 13 L. R. (Eq.) 470.

Election to take property unconverted.—Although land absolutely directed or agreed to be converted into money, and money directed or agreed to be converted into land, will immediately be impressed with the character of the property into which each is respectively to be converted, still this notional conversion may be put an end to by the *absolute owner* electing to take the property in its actual state; and the

Court will not direct a conversion against his election, because, when converted, he might immediately reconvert it; for, as is quaintly observed by Lord Cowper, in *Seeley v. Jago*, 1 P. Wms. 389, "Equity, like nature, will do nothing in vain."

An *infant* cannot ordinarily elect (*Carr v. Ellison*, 2 Bro. C. C. 56; *Van v. Barnett*, 19 Ves. 102): but where the property is the subject-matter of a suit, upon the certificate of the chief clerk, finding that it is for the benefit of the infant to do so, he may elect: *Robinson v. Robinson*, 19 Beav. 494.

A *lunatic* cannot elect: *Ashby v. Palmer*, 1 Mer. 296; *In re Whar- ton*, 5 De Gex, Mac. & G. 33.

A *feme covert* cannot elect, by a contract or ordinary deed (*Oldham v. Hughes*, 2 Atk. 452; *Frank v. Frank*, 3 My. & Cr. 171. But although, as observed by Lord Hardwicke, in *Oldham v. Hughes*, 2 Atk. 453, "a feme covert cannot alter the nature of money to be laid out in land, *barely* by a contract or deed; for, to alter the property of it, or course of descent, this money must be invested in land (and sometimes sham purchases have been made for that purpose), and she may then levy a fine of the land, and give it to her husband, or anybody else; there is a way, also, of doing this, without laying the money out [*866] *in land, and that is by coming into this Court, whereby the wife may consent to take this money as personal estate; and upon her being present in court, and being examined (as a feme covert upon a fine is), as to such consent, it binds this money articulated to be laid out in land, as much as a fine at law would the land, and she may dispose of it to the husband, or anybody else; and the reason of it is this, that at law money so articulated to be laid out in land, is considered barely as money, till an actual investiture, and the equity of this Court alone views it in the light of a real estate; and, therefore, this Court can act upon its own creature, and do what a fine at common law can upon land; and if the wife has craved aid of this Court, in the manner I have mentioned, she might have changed the nature of this money which is realized, but she cannot do it by deed."

The necessity of making the sham purchases, alluded to by Lord Hardwicke, caused much inconvenience, which was attempted to be remedied by 39 & 40 Geo. 3, c. 56, and subsequently by 7 Geo. 4, c. 45; but these statutes have been repealed by stat. 3 & 4 Will. 4, c. 74, whereby a married woman can, by deed executed in compliance with its provisions, make her election to take or dispose of money to be laid out in land. See 3 & 4 Will. 4, c. 74, and 1 Hayes' Intro. 4th ed. 186; see also *Forbes v. Adams*, 9 Sim. 462.

So, likewise, a married woman may by a similar deed elect to take real estate directed to be converted into money (*May v. Roper*, 4 Sim. 360; and *Briggs v. Chamberlain*, 11 Hare, 69; *Franks v. Bollans*, 3 L. R. Ch. App. 717; *Bowyer v. Woodman*, 3 L. R. Eq. 313; sed vide

Hobby v. Collins, 4 De Gex & Sm. 289), even though her interest is reversionary; *Tuer v. Turner*, 20 Beav. 560.

A married woman may, under the 7th section of the Lands Clauses Consolidation Act, dispose of her reversionary interest in real property to a railway company, so as to convert the proceeds into personality: *Cooper v. Gostling*, 4 Giff. 449.

Where an estate is directed to be sold, and the money arising from the sale to be divided among several persons, none of them, as is laid down in the principal case, have a right to say that any part shall not be sold, and elect to take his share in land; for, to allow election in such a case, would be injurious to the sale of the entirety; *Deeth v. Hale*, 2 Moll. 317; *Smith v. Claxton*, 4 Madd. 484, 494; *Chalmer v. Bradley*, 1 J. & W. 59; *Trower v. Knightley*, 6 Madd. 134; *Holloway v. Radcliffe*, 23 Beav. 163, 171.

But if money be directed to be laid out in land, to the use of several persons as tenants in common* any one of them may elect to [*867] take his share of the money, for the residue of the money may be quite as advantageously invested in the purchase of land as the whole; *Seeley v. Jago*, 1 P. Wms. 389; *Walker v. Denne*, 2 Ves. jun. 182.

A remainderman may elect, but not so as to affect the interests of the owners of prior estates: *Lingen v. Sowray*, 1 P. Wms. 173; *Pulteney v. Darlington*, 1 Bro. C. C. 223; *Crabtree v. Bramble*, 3 Atk. 680; *Triquet v. Thornton*, 13 Ves. 345; *Stead v. Newdigate*, 2 Mer. 531; *Gillies v. Longlands*, 4 De G. & Sm. 372, 379; and see *In re Stewart*, 1 Sm. & Giff. 32.

A tenant in tail of money to be invested in land might, as against his issue, elect to take it in its actual state, and upon his election immediate payment would be made to him by the Court (see *Benson v. Benson*, 1 P. Wms. 130; *Short v. Wood*, 1 P. Wms. 470; *Edwards v. Countess of Warwick*, 2 P. Wms. 173); but where there are remainders over, payment would not be made to the tenant in tail except by the consent of the remainderman: *Trafford v. Boehm*, 3 Atk. 440. "Upon a bill by tenant in fee," says Lord Hardwicke, "the Court would decree it to be paid in money, because he might immediately sell the land and turn it into money; and the old rule was, that the Court would also decree it so upon a bill by tenant in tail, with remainders over. And thus it stood, till the case of *Colwell v. Shadwell*, 1 P. Wms. 471, 485, where Lord Cowper held the remainderman should have his chance, as it could not be barred but by recovery, which required time, and would not direct it to be paid in money; and the accident of the death of tenant in tail in that case, before a recovery, showed the remainderman's interest in so glaring a light, that it has established the precedent ever since. But where the remainder can be barred by fine, the Court will decree it in money:" *Cunningham v. Moody*, 1 Ves. 176. See, now, 3 &

4 Will. 4, c. 74, s. 71, which enacts, "that money to be invested in the purchase of lands, to be settled so that any person, if the lands were purchased, would have an estate tail therein, shall, for all the purposes of this Act, be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to: and all the previous clauses in this Act, so far as circumstances will admit, shall apply to such money, in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled."

Where a railway company has taken the land of a tenant in tail, which has been conveyed to them *in fee, the tenant in tail, [*868] after a conveyance in fee has been executed to the company, may obtain payment of the purchase-money of the land without executing a disentailing deed: *In re The South-Eastern Railway Company*, 30 Beav. 215; *Notley v. Palmer*, 1 L. R. Eq. 241; *Ex parte Maunsell*, 2 Ir. R. Eq. 32, changing the practice as laid down in the case of *In re G. S. & W. Railway Company*, *Ex parte The Duke of Leinster*, 9 L. Eq. Rep. 482.

And where purchase-money paid into court by a railway company belongs to a married woman, the Court will pay it out to her without her acknowledgment by deed, but simply upon her consent on examination and on an affidavit of no settlement. *In re Hayes*, 9 W. R. (V. C. K.) 769; and see *Ex parte Ellison*, 2 Y. & C. (Exch. Ca.) 528; *Sowry v. Sowry*, 6 Jur. N. S. 336, 8 W. R. 339; *Re Tyler*, Ib. 540; *Re Worthington*, Seton on Decrees, 324, Morgan's Chancery Acts and Orders, p. 32, 3rd ed.

How election may be made.—Supposing the person competent to elect, election may be made either by express declaration, or by acts from which the Court will presume an election to have been made.

An express declaration to elect may be made by parol, according to the opinion of Lord Macclesfield in *Edwards v. The Countess of Warwick* (2 P. Wms. 174); but in *Bradish v. Gee* (Amb. 229) Lord Hardwicke said, that although very slight evidence of the intention to elect would be sufficient, he could not admit that a parol declaration would be sufficient, as was intimated by Lord Macclesfield in *Edwards v. The Countess of Warwick*. However, in *Chaloner v. Butcher* (cited 3 Atk. 685), where the dispute was between the representative of personal state and an heir-at law, money on mortgage was agreed to be laid out in land for the husband for life, for the wife for life, and if no issue, for the husband absolutely, who after the wife's death without issue, declared it should not be laid out in land; the Court held, if the question concerned the right of a third person, the declarations of the husband should not be read; but as it was between his personal and real representative, they should be read, and determined it upon the declaration

only. See, also, *Pulteney v. Lord Darlington*, 1 Bro. C. C. 237: *Wheldale v. Partridge*, 8 Ves. 236, where both Lord Thurlow and Lord Eldon consider that election may be declared by parol. The dictum, therefore, of Lord Hardwicke to the contrary may be considered as overruled.

Where a person entitled absolutely, or subject to a preceding life interest, to a fund to be invested in the purchase of land, bequeaths it by the description of *so much money agreed to be laid out in land this bequest will shew a sufficient intention to elect to take the [*869] fund as personalty; and, therefore, being divested of the real uses, it would, previous to the late Wills Act, 1 Vict. c. 26, have passed to the legatee, although the will was unattested; but without such a particular interposition of the testator manifesting his intention, it would remain as land, and would consequently belong to the devisee or representative of the real, not of the personal estate. See *Pulteney v. Darlington*, 1 Bro. C. C. 235, 236; 3 P. Wms. note (c), and cases there cited.

The presumption that a person has made an election will arise from very slight circumstances: *Pulteney v. Darlington*, 1 Bro. C. C. 238; *Van v. Barnet*, 19 Ves. 109; *Cookson v. Cookson*, 12 C. & F. 121; *Dixon v. Gayfere*, 17 Beav. 433. Thus, if a person keeps land unsold, a presumption will arise that he elected to take it as land: *Ashby v. Palmer*, 1 Mer. 301; *Crabtree v. Bramble*, 2 Atk. 688; *Inwood v. Twyne*, 2 Eden, 148; but in *Kirkman v. Miles*, 13 Ves. 338, where the persons entitled to the proceeds to arise from the sale of land had entered upon and occupied it for two years, and neither they nor the trustees had taken any steps to sell the estate, nor had they made any requisition to the trustees for that purpose, Sir William Grant, M. R., held, "that only two years was too short to presume an election." In *Davies v. Ashford* (15 Sim. 44), real estates were, by marriage settlement, conveyed to trustees, in trust to sell, and to hold the proceeds in trust for the husband and wife for their lives successively, remainder in trust for their children, remainder in trust for the survivor of the husband and wife absolutely; there was no child of the marriage. The husband survived his wife, and after her death consulted his solicitors upon his rights under the settlement; and they having advised him that he was entitled to the whole beneficial interest in the estate, he got possession of the settlement and of the title-deeds, and remained in possession of them, and also of his estates, until his death. It was held by Sir L. Shadwell, V. C., that he thereby elected to take the estates as land. "I admit," said his Honor, "that the settlement contained a clear trust for sale which must have been exercised unless the husband did some act which shewed that he meant the trust to be at an end, and to take the estates as land. It does not distinctly appear in whose custody the title-deeds originally were; but it is clear that there was a

change in the possession of them, and that the husband got them into his custody. Now, was not that, of necessity, a destruction of the trust; for the trustees could not have compelled the husband *to [*870] deliver up the deeds, and without doing so, they could not have made any effectual sale of the estates. Therefore, it seems to me, that by consulting upon his rights under the settlement, and then taking the deeds into his possession (from whom or by what means he obtained them is immaterial), he made a clear election to take the estates as land." See also *Brown v. Brown*, 33 Beav. 399; *Sisson v. Giles*, 3 De G. Jo. & Sm. 614.

Although a person entitled to an *immediate* interest in land directed by a will to be sold has, by his acts shewn his intention to reconvert and take them in their actual state, this doctrine will not be applicable to lands devised by the same will, if the direction to convert only comes into operation *after* a life interest still in existence, for he would not by his acts, with reference to the lands in possession, have shown his intention to reconvert those to which he was only entitled in remainder. See *Meredith v. Vick*, 23 Beav. 559.

Where securities for monies were assigned to trustees, to be invested in land to be settled upon a man and his wife for life, with an ultimate limitation to the man's right heirs; and the husband died after some of the money had been put out upon other securities, in trust for him, "*his executors and administrators*," Lord Keeper Harcourt held, that the husband had elected to take the securities as personal estate, upon the ground that the placing the money out upon different trusts was an alteration of the nature of it, since the testator's declaring the trust to *his executors and administrators*, seemed tantamount with his having declared that it should not go to his heirs: *Lingen v. Sowray*, 1 P. Wms. 172. See also *Cookson v. Cookson*, 12 C. & F. 121; *Harcourt v. Seymour*, 2 Sim. N. S. 12.

Upon the same principle, in the case of land to be converted into money, Lord Hardwicke held, that a grant of a lease, reserving rent to the grantor, *her heirs and assigns*, was strong evidence of the intention of the grantor to elect that it should continue as land. His Lordship observed, that the grantor had reserved rents to herself, *her heirs and assigns*, and that it was said by the plaintiff's counsel that she could not do otherwise, and it was very true that she could not; yet, though she could not reserve otherwise, there was equal reason in the present case to hold it as her intent that it should go to her heir, as in *Lingen v. Sowray*, to the executors, and that would be sufficient to determine the question between the representative of the personal estate and the heir: *Crabtree v. Bramble*, 3 Atk. 680, 689. See also *Griesbach v. Fremantle*, 17 Beav. 314.

[*871] Where the person absolutely *entitled to money to be laid out in land receives the money from the trustees, he elects to

take it as money: *Pulleney v. Lord Darlington*, 1 Bro. C. C. 238; *Trafford v. Boehm*, 3 Atk. 440; *Rook v. Worth*, 1 Ves. 461; but not where he receives the income, although for a considerable time: *Gillies v. Longlands*, 4 De G. & Sm. 372; *Re Pedder's Settlement*, 5 De G. Mac. & G. 890.

These remarks may be concluded with the observation, that the doctrine of conversion proceeds upon the principle, *that equity considers what ought to be done as done*. It follows, therefore, that the neglect of trustees to perform their duty, either by converting land into money or money into land, will not affect the rights of others. "The forbearance of the trustees," says Sir J. Jekyll, M. R., "in not doing what it was their office to have done, shall in no sort prejudice the cestui que trusts, since at that rate it would be in the power of trustees, either by doing or delaying to do their duty, to affect the right of other persons, which can never be maintained. Wherefore the rule in all such cases is, *that what ought to have been done shall be taken as done*; and a rule so powerful it is as to alter the very nature of things, to make money land, and on the contrary, turn land into money:" *Lechmere v. Earl of Carlisle*, 3 P. Wms. 215.

The law of conversion appears to be the same in Scotland as in England: *Buchanan v. Angus*, 4 Macqueen, Ho. Lo. Cas. 374.

The authority of the principal cases has been repeatedly recognized in the American courts, and the doctrine established by it may be regarded as received generally throughout this country. A leading case is *Craig v. Leslie*, 3 Wheaton, 564, where the subject was ably and thoroughly discussed. The question, there, was, whether lands devised, with personal estate, to be sold, and the proceeds of the whole given to an alien, amounted to a bequest of money, which an alien could take, or to a devise of land, which he could not take, and the decision was in favor of the former. "Were this a new question," said Washington, J., in delivering the opinion of the court, "it would seem extremely difficult to raise a doubt respecting it. The

common sense of mankind would determine, that a devise of money, the proceeds of lands directed to be sold, is a devise of money, notwithstanding it is to arise out of land; and that a devise of land, which a testator by his will directs to be purchased, will pass an interest in the land itself, without regard to the character of the fund out of which the purchase is to be made. The settled doctrine of the courts of equity corresponds with this obvious construction of wills, as well as of other instruments, whereby land is directed to be turned into money, or money into land, for the benefit of those for whose use the conversion is intended to be made. In the case of *Fletcher v. Ashburner*, (1 Bro. Ch. Cas. 497,) the Master of the Rolls

says, that 'nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given.' He adds, 'the owner of the fund, or the contracting parties, may make land money, or money land. The cases establish this rule universally.' This declaration is well warranted by the cases to which the Master of the Rolls refers, as well as by many others. (See *Dougherty v. Bull*, 2 P. Wms. 320; *Yeates v. Compton*, Ib. 358; *Trelawney v. Booth*, 2 Atk. 307.) The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance, and not the mere forms and circumstances of agreements and other instruments, considers things directed or agreed to be done, as having been actually performed, where nothing has intervened which ought to prevent a performance."

The same principle is re-affirmed in *Peter v. Beverly*, 10 Peters, 534, 563. See, also, *Taylor et al. v. Benham*, 5 Howard's Sup. Ct. 234, 269.

This doctrine will be found laid down in almost the same language in *Smith v. McCrary*, 3 Iredell's Eq. 204, 207; *The Commonwealth v. Martin's Executors and Devisees*, 5 Munford, 117, 121, 122; *Tazewell et al. v. Smith's Adm'r*,

1 Randolph, 313, 320; *Pratt v. Taliaferro*, 3 Leigh, 419, 421, 427; *Siter, Price & Co. v. M^r. Clanachan et als.*, 2 Grattan, 280; *Hurt v. Fisher*, 1 Harris & Gill, 88, 96; *Leadenham v. Nicholson*, Ib. 267, 277; *Gott v. Cooke*, 7 Paige, 523, 534. "Upon the principles of equitable conversion," said the chancellor, in *Lorillard v. Coster*, 5 Id. 173, 218, "money directed by the testator to be employed in the purchase of land, or land directed to be sold and turned into money, is, in this court, for all the purposes of the will, considered as that species of property into which it is directed to be converted; so far as the purposes for which such conversion is directed to be made are legal, and can be carried into effect. The same principle is also applicable to the case of a direction in a will to sell one piece of land and to convert it into another, for the purposes of the will, by investing the proceeds of the sale in the purchase of such other lands, under a valid power in trust to make such sale and re-investment. The whole doctrine of equitable conversion depends upon the well established and familiar principle, that a court of equity looks upon that as done, which the parties to an agreement, or marriage settlement, have contracted to do, or which the testator by his will has directed to be done; so far as the contract of the parties, or the will of the decedent, could have been carried into effect, without violating any equitable principle or rule of law." The

general doctrine is vindicated at some length in *Kane v. Gott*, 24 Wendell, 641, 660.

The principle, that in equity, land directed to be converted into money, or money directed to be converted into land, is to be treated as that species of property into which the one or the other is so directed to be converted, was fully adopted in Pennsylvania, in *Allison, Executor of Henderson*, v. *Wilson's Executors*, 13 Sergeant & Rawle, 330, 332, and was vindicated in point of reason, with great force, by Chief Justice Gibson, in *Morrow, for the use of the Heirs of Isett*, v. *Brenizer*, 2 Rawle, 185, 189; and has ever since been fully maintained in that State; *Burr v. Sim*, 1 Wharton, 252, 262; *Willing v. Peters*, 7 Barr, 287, 290. The courts of Kentucky, though they do not reject the principle, obviously regard it with disfavor: see *Clay and Craig v. Hart*, 7 Dana, 1, 11, 12; *Samuel v. Samuel's Ad's, Heirs, &c.*, 4 B. Monroe, 245, 253.

A devise of land to be sold, or of money to be laid out in land, works a conversion from the death of the testator: see *Van Vechten v. Van Vechten*, 8 Paige, 106, 124, 129. If the conversion be absolutely directed, it matters not that the time of the sale is postponed: *Leiper v. Thomson*, 10 P. F. Smith, 177; *M'Clure's Appeal*, 22 Id. 414. If the direction to sell is absolute, the land is to be considered as money for all the purposes of the will from the death of the testator, although the period prescribed for the sale is

remote, and there can be no actual conversion till it arrives: *M'Clure's Appeal*. A devise of lands to be sold, after a life estate arising under the will, and the proceeds distributed to certain persons, is a pecuniary bequest to those persons, vesting from the death of the testator; *M'Clure's Appeal*; *Fairly v. Kline*, Pennington, 754; *Reading v. Blackwell*, Baldwin, 166; *Rinehart and Wife v. Harrison's Executors*, Ib. 177; *Loftis v. Glass*, 15 Arkansas, 680. "The general rule is, to date the conversion as taking place on the death of the testator; unless there is something special in the power of sale, making its exercise or performance depend on the happening of some event or contingency to arise subsequently, or on the discretion of the executor or trustee to sell or not. But if the direction is imperative, requiring a sale at all events, and leaving it discretionary only as to the time and manner of selling, then the sale when made, has the same effect, in respect to the rights of parties in interest, as though made immediately:" *Arnold v. Gilbert*, 5 Barbour's S. Ct. 192, 196.

Hence, where an estate is ordered to be sold, at the death of a widow, and the proceeds divided among the children, the shares of those who die in her lifetime will vest in their personal representatives, and not in their heirs; *Brothers v. Cartwright*, 2 Jones's Equity, 113; *Horner's Appeal*, 6 P. F. Smith, 405; a dictum the other way, in *Savage v. Burnham*, 17 New York R. 561, 569, seems

to have been foreign to the case, and may be thought not to be law.

An agreement or deed, also, between proper parties, will produce a transmutation in equity, from the time that the agreement takes effect legally: see *Naglee v. Ingersoll*, 7 Barr, 185, 196; *Washington's Ex'or v. Abraham et als.*, 6 Grattan, 66, 76. A conveyance to a trustee, in trust forthwith to buy or sell, for the grantor's benefit, or for the payment of debts, works an immediate conversion; *Loughborough v. Loughborough*, 14 B. Monroe, 549. In *Siter, Price & Co. v. M'Clanachan et als.*, 2 Grattan, 280, a husband and wife conveyed the equity of a redemption in the wife's land to a trustee to sell for their use and benefit; and it was decided that the property thereby, in equity, became converted into money, and brought under the control of the husband, as personalty. "The effect of this deed," said Baldwin, J., "was, in the contemplation of a court of equity, to convert the property thereby conveyed from realty into personalty. It is well settled, that land directed or agreed to be sold and turned into money, (upon the principle that what is agreed or ought to be done, is considered as done,) shall be treated as immediately assuming the quality of personalty, and as continuing impressed with that character, until some person entitled to the proceeds, shall elect to take the subject in its original character of land."

It is agreed in the American cases, that Lord Rosslyn's notion, in *Walker v. Denne*, 2 Ves. Jr.

170, 176, that there is no equity as between the heir and personal representative, to have the property in any other form than that in which it actually is at the death of the person through whom they claim, is completely overruled, and that the will of the original testator confers, positively and effectively, upon the subject, such character as he has thought proper to direct: see *Tazewell et al. v. Smith's Adm'r*, 1 Randolph, 313, 321; *Pratt v. Taliaferro*, 3 Leigh, 419, 423, 429; *Craig v. Leslie*, 3 Wheaton, 564, 579.

Conversion of Land into Money.

—Where land is directed by will to be sold and converted into money, the interest vests in the parties entitled, as personal estate; *Ferguson and Wife v. Stuart's Ex'ors*, 14 Ohio, 140, 146; *Sharp-ley v. Forwood's Ex'or*, 4 Harrington, 336; *Carr v. Ireland*, 4 Maryland Chancery, 257; *Maddox v. Dent*, Ib. 543; *Collier v. Collier*, 3 Ohio, N.S. 369; *Croom v. Henning*, 4 Hawks, 393; *Loftis v. Gross*, 15 Arkansas, 680; *Smithers v. Hooper*, 23 Maryland, 273; *Johnson v. Bennett*, 39 Barb. 237; *Harris v. Slight*, 46 Id. 470; *Ex parte M'Bee*, 63 North Carolina, 332; *Bro-lasky v. Gally*, 1 P. F. Smith, 509; *Parkinson's Appeal*, 8 Harris, 455; *Taylor v. Burham*, 5 Howard, 243; *Rawlings v. Landes*, 2 Bush. 158; *Wilkins v. Taylor*, 8 Richardson's Eq. 294. If one of the parties entitled, dies before an actual sale, the fund will go to his personal representative as money, since the party himself would have taken money; *Smith v. M'Crary*,

3 Iredell's Equity, 204, 207; *Pratt v. Taliaferro*, 3 Leigh, 419, 428; *Washington's Ex'or v. Abraham et al.*, 6 Grattan, 66, 77; *Reading v. Blackwell*, Baldwin, 166; *Marsh v. Wheeler*, 2 Edwards, 157, 160; if the party is a *feme covert*, and she dies at any time after the testator, her husband as her personal representative will take the bequest as personalty; *Hurt v. Fisher*, 1 Harris & Gill, 88, 96; per Coulter, J., in *The Commonwealth v. Martin's Executors and Devisees*, 5 Munford, 117, 127; *Brothers v. Cartwright*, 2 Jones, Equity, 113; see also, *Siter, Price & Co. v. M'Clenachan et als.*, 2 Grattan, 280; *Fairly v. Kline*, Pennington, 754; and upon his death before the sale, it will go to his personal representative; *Rinehart and Wife v. Harrison's Executors*, Baldwin, 177, 187. A person to whom are bequeathed the proceeds of land directed to be sold, has no estate in the land, but only an interest in the execution of the trust: he has no such interest in real estate, as can be bound by the lien of a judgment, and a sale of his interest under an execution against the land passes nothing to a purchaser at the sheriff's sale: *Allison, Executor of Henderson v. Wilson's Executors*, 13 Sergeant & Rawle, 330, 332; *Morrow v. Brenizer*, 2 Rawle, 185, 188; *Hartman's Estate*, 4 Id. 39, 44; *Wintercast and others v. Smith*, Ib. 177, 184; *Stuck v. Mackey*, 4 Watts & Sergeant, 196, 197; *Willing v. Peters*, 7 Barr, 287, 290. Land devised to be sold, and the proceeds given to an

alien, or land agreed to be converted into personal estate, is so completely personal estate in equity, that an alien is capable of taking the full benefit of the property; *Craig v. Leslie*, 3 Wheaton, 564; *Anstice v. Brown*, 6 Paige, 448; *De Barante v. Gott*, 6 Barbour, S. Ct. 493, 497: see, also, *The Commonwealth v. Martin's Executors and Devisees*, 5 Munford, 117. If land be directed to be converted into personal estate, the will, in respect to the dispositions, must be governed by the rules of law applicable to limitations of personal property; *Burrill v. Shiel*, 2 Barbour's S. C. 459, 470.

Upon the principle of equitable conversion, the purchase-money of lands contracted to be sold during the lifetime of the testator, whether paid before his death or afterwards, is a part of his personal estate; and if not legally bequeathed by the will, will be distributed to the widow and next of kin, as personal assets; *Hawley v. James*, 5 Paige, 323, 456; *Drenkle's Estate*, 3 Barr, 377; *Henson v. Ott*, 7 Indiana, 512. The legal title, however, still remains in the vendor, and will be bound by the lien of a judgment, although when the judgment is subsequent, it will be subject to the right of the vendee to have the land, free from incumbrance, on paying the price; *Leiper's Executors v. Irwin*, 2 Casey, 55. Even, therefore, when the land is sold under a judgment, prior to the sale, the right of subsequent judgment-creditors will be limited, to the purchase-money un-

paid at the time when their judgments were obtained; and any surplus will belong to the vendee, as being the proceeds of his estate or interest in the land; *Siler's Appeal*, 2 Casey, 178.

A contract to sell at the option of the purchaser converts the land into money from the execution of the contract, if it is eventually fulfilled; *Kerr v. Day*, 2 Harris, 112, 114; *Ely v. Beaumont*, 5 S. & R. 524; *D'Arras v. Keyser*, 2 Casey, 249; although not if it fails of effect from the refusal of the purchaser, or an inherent cause; *Kerr v. Day*.

Conversion of Money into Land.—Money directed to be laid out in land, and held on certain trusts, must be considered and treated as real estate, for the purpose of deciding on the validity of the settlement directed; *Hawley v. James*, 5 Paige, 323, 443; *Gott v. Cook*, 7 Id. 523, 534; *Collins v. Champ*, 15 B. Monroe, 118; *Taylor v. Johnson*, 63 North Carolina, 381.

The question of conversion depends on the intention of the testator, which need not be expressly declared, but may be derived from the general effect of the will; *Burr v. Sim*, 1 Wharton, 252, 262; *Green v. Johnson*, 4 Bush. 164. "Where a testator authorizes his executors to sell real estate, and it is apparent from the general provisions of the will that he intended such estate to be sold, the doctrine of equitable conversion applies, although the power of sale is not in terms imperative;" *Dodge v. Pond*, 23 New York, 69. To operate as

an immediate conversion from the testator's death, it must, nevertheless, appear in terms, or by necessary implication, that he intended the property to be sold absolutely, and at all events; *Arnold v. Gilbert*, 3 Sandford, 533, 556. A charge of debts upon land, or a contingent power, or direction, or agreement to convert, does not affect an immediate, equitable conversion; *Naglee v. Ingersoll*, 7 Barr, 185, 196, 197; *Harris v. Clark*, 3 Selden, 248; *Dominick v. Michael*, 4 Sandford's Sup. C. 374; *Buckley v. Buckley*, 11 Barbours, 43, 76; nor does a discretion to executors to sell, if they think proper, or to sell any land which they think proper, work a conversion before the discretion is determined by a sale; *Blight v. Bank*, 10 Barr, 131; *Clay & Craig v. Hart*, 7 Dana, 1, 11; *Samuel v. Samuel's Ad's, Heirs, &c.*, 4 B. Monroe, 245, 253; *Allen v. De Witt*, 3 Comstock, 276; *Clinefelter v. Ayres*, 16 Illinois, 329; *Montgomery et ux. v. Milliken et ux. et al.*, 1 Smedes & Marshall's Chancery, 495, 498; *Pratt v. Taliaferro*, 3 Leigh, 419, 430. "To establish a conversion, the will must direct it absolutely, or out and out, irrespective of all contingencies. The direction must be positive and explicit, and the will, if it be by will, or the deed, if it be by contract, must irrevocably stamp the character of money on the land;" *Anewalt's Appeal*, 6 Wright, 414; *Chew v. Nicklin*, 9 Id. 84. [So where it is left to the heirs or legatees, or to a third person to determine whether the land

shall be sold, it will descend as such, and not as money; *Miller's Appeal*, 10 P. F. Smith, 404; *Henry v. M' Closkey*, 9 Watts, 145; *Nagle's Appeal*, 1 Harris, 260; *Stoner v. Zimmerman*, 9 Id. 394. Thus in *Stoner v. Zimmerman*, a direction that real estate should "be sold at the expiration of fourteen years, if it was the wish of the testator's children, at the time, to have it so," was held not to deprive it of the character of realty; although a sale was ultimately made in accordance with the will. In *Nagle's Appeal*, the testator after giving an estate to his wife, during widowhood, devised as follows: "At her decease, it is my desire, if the majority of my children be agreed, that my executors shall sell all my real estate, (the house in Market street excepted, which house I would not wish to be sold until three years after my wife's decease, if the majority of my children be agreed,) and give unto my son John \$500, money borrowed from him." He then desired his executors to give \$500 to each of his seven children, out of the proceeds of his real estate, and directed the residue to be equally divided between them, in three years after receiving the \$500; but "if any of the children did not make a good use of the \$500, the executors were to keep the residue, to administer it as their necessities required." It was contended, that the direction to distribute it among the testator's children, made the obligation to sell imperative, and that the testator could not have meant that a majority of the lega-

tees should have the power to frustrate the bequest, in which all were interested. The court was, nevertheless, of opinion, that the consent of the majority of the children was a condition precedent, and consequently that the land was not converted into money. So a direction to sell within a certain time, if the testator survives his wife, does not operate as an equitable conversion, and the executors cannot make a good title after the time has expired; *Dunshee v. Goldbecher*, 56 Barb. 579.]

A proviso, that if one or more of the parties interested prefers to take the land as such, it shall not be sold, will not prevent a conversion, when it would otherwise result from the will. In *Pratt v. Taliaferro*, 3 Leigh, 419, land was devised to be sold, and the proceeds divided between the testatrix's daughter and granddaughter; but "if my daughter, when of age, or married, so desires, she may take the land in fee, on paying half its value." The daughter married, and her husband paid half the value to the granddaughter, took possession of the land, and sold it as his own. It was held, that this did not operate as an election by the wife, and that the character of personalty having been impressed on the estate by the will, the husband was entitled to it absolutely *jure mariti*.

Where the direction or intention to sell is absolute and certain, but the time of sale is discretionary with the executors or trustees, the question of equitable conversion has been differently determined in

different courts. In *Chrisler's Executors, &c. v. Meddis, Adm'r*, 6 B. Monroe, 35, a devise of land to a trustee, "to be by him sold at any time he may think best," was held not to effect a conversion from the testator's death. "Real estate," said Ewing, C. J., "is converted into personalty, immediately on the death of the devisor, only where the direction to sell is positive, without limitation as to time, and without discretion on the part of those to whom the power to sell is delegated. If discretion is given, as in the case before us, the conversion does not take place until the sale is made." But the weight of authority is the other way, and in favor of the principle that if the direction to sell is absolute, a discretion as to time or manner, will not suspend the conversion; *Wurtz v. Page*, 4 C. E. Green, 65. In *Tazewell et al. v. Smith's Adm'r*, 1 Randolph, 313, 319, 320, a testator had directed all his estate, real and personal, to be sold by his executors, or such of them as shall qualify, "at any time and in any manner, he or they shall think proper," and the income of the proceeds to be distributed between his two sons. It was decided that an immediate conversion in equity took place, and that the discretion as to the time of sale had no effect upon the question. "In every instance of a sale by an executor," said Cabell, J., "some time must, of necessity, elapse between the death of the testator and the sale; and something is almost invariably left to the discretion of the execu-

tor, as to the time of selling. Yet that makes no difference where, as in this case, the direction to sell is imperative. . . . The important question is, whether the character of land or money is definitely and imperatively affixed, by the will, to the property; for, the character thus impressed upon it, will remain so impressed, until some person having a right to elect, elects to take it in its original character; *Ashby v. Palmer*, (1 Mer. 296; 2 Mad. 108-110, and the cases there cited.) Land, therefore, thus impressed with the character of money, will, until election be made to take it as land, pass as money, although it has not been actually converted into money. The counsel for the appellants relied upon the principle laid down in *Walker v. Denne*, (2 Ves. 170,) that the property will pass according to the state in which it happens to be at the death of the person from whom it is claimed. But that principle has been repeatedly overruled; *Welldale v. Partridge*, (8 Ves. 227;) *Biddulph v. Biddulph*, (12 Id. 161;) *Kirkman v. Miles*, (13 Id. 338;) *Ashby v. Palmer*, (1 Mer. 296.) The other cases relied on have no application. In all of these, there was, from some cause or other, a resulting trust, in whole or in part, for the heir-at-law of the testator. But, in the case before us, the conversion into money is imperative, *to every intent, out and out*; and the whole proceeds of sale, after payment of debts, are given as personal property to the two sons of the testator." In

like manner, in a case in New York, where a testator directed his executors, all, or such of them as might undertake the trust, after paying legacies, "to sell and dispose of the remainder of his estate, both real and personal, to the best advantage in their power, and as sound discretion directs," and divide the whole proceeds equally among his children, it was held that an absolute conversion took place from the testator's death. "Under this clause," said the assistant vice-chancellor, "although there was a discretion as to the time of sale, the direction to sell the real estate was absolute and imperative. It was only after such sale that it could be divided, or indeed that it was to be received by the children. The gift to them was not of land, but of the proceeds of land to be sold, and of personal estate. Thus, the quality of personalty was given to the produce of this real estate *to all intents*; and not merely for any particular purpose of the will. There was, therefore, an equitable conversion of this real estate, and it is to be considered in this court, as having been personal property for all the purposes of the will;" *Martin v. Sherman*, 2 Sandford, 341, 343. Again, where a testator devised and bequeathed to his executors all his estate, real and personal, to sell such estate or any part of it, whenever they should think fit, with authority to lease; and gave directions as to the disposal of the proceeds of the sale or leases, it was held that a conversion took place from the testa-

tor's death. "The intent and direction of the testator to sell the land was absolute, or 'out and out' for all purposes," said Jewett, Ch. J., in the Court of Appeals. "The discretion of the executor in respect to the sale, related merely to the time when," &c.; *Stagg v. Jackson*, 1 Comstock, 206, 212.

When the direction to sell is for a particular purpose only, it may frequently happen that a direction as to time will be connected with a contingency as to the fact of sale, but where the real estate or a general residue of it is mixed up with the personal estate, and the whole ordered to be converted into money, for distribution to persons surviving the testator, the intent to convert is absolute, and the fact of an ultimate conversion, if not arrested by election, is certain; and in such a case, a discretion as to time or manner is without influence upon the question.

The purchase of land with the assets of a firm converts it into personalty, but as the weight of authority seems to be, only so far as may be requisite for the purposes of the partnership; *ante*, 293. In *Foster's Appeal*, 24 P. F. Smith, 371, a firm owned real estate purchased with firm funds and held as partnership property. One of the partners died, and his administratrix sold, by order of the Orphans' Court, his interest in the real estate to the surviving partner, for the sum of \$25,500; he to pay all the firm debts, the indebtedness of the decedent to the firm, and his individual debts. The court held that the surplus

was real estate, and should be so distributed. Sharswood, J., said: "For all the purposes of the question before us, this case must, therefore, be considered the same as if, after dissolution by the death of one partner, and payment of all partnership debts, and any balance due the surviving partner, there had remained in specie, unconverted land, the interest of the deceased partner, which is ascertained to be worth \$25,508.30. Is the land thus remaining unconverted and in specie, to be regarded for the purposes of distribution, under the intestate laws, as real or personal? . . .

Conversion is altogether a doctrine of equity. In law it has no being. It is admitted only for the accomplishment of equitable results. It may be termed an equitable fiction, and the legal maxim, *In fictione juris semper subsistit equitas*, has redoubled force in application to it. It follows, of necessity, that it is limited to its end. Lord Eldon advanced this idea while his mind was evidently laboring and in suspense on the general subject. In *Ripley v. Waterworth*, 7 Ves. 425, he said: "There is an obvious difference from all the cases, which establish this general principle, that where a person dealing upon his own property only, had directed a conversion for a particular, special purpose, or out and out, but the produce to be applied to a particular purpose, when the purpose fails, the intention fails; and this court regards him as not having directed the conversion."

There must be some purpose recognized as lawful to be accomplished by a conversion before equity permits it to have a place. Surely it will not be pretended that a man could, by a mere declaration of record, convert his land into personalty, so as to defeat the lien of the mortgages, judgments, and other encumbrances, elude the provision of the Statute of Frauds, and change the course of distribution in case of intestacy. If, however, a trust is created, either by deed or will, with an absolute direction to sell, and distribute the proceeds either among creditors or others, equity considers that as actually done which has been directed to be done, in order to accomplish the lawful intent of the grantor or testator. If it continued land, subject, as such, to sale, mortgage, and encumbrance, by the eventual distributees—the present *cestuis que* trust—the result aimed at might be defeated, and the intention frustrated. So, where land is by the agreement of the partners made partnership stock, it is an out-and-out conversion only, because otherwise the objects of the partnership would be defeated, if the sale, mortgage, or encumbrance of his separate interest by one partner could prevent the equity of the other partners to have the partnership property applied to the payment of the partnership debts, and the balances which might be due to them respectively. When the purpose of conversion is attained, conversion ends, or more accurately, re-conversion takes place. Thus when

the sale under the trust is made, the character of personalty does not follow the land into the hands of the purchaser. The proceeds are personalty, and are distributed as such among the *cestuis que trust*, because that was the very object of the conversion. So with land in partnership, when sold by the firm, the land becomes land again in the hands of the purchaser, and the proceeds personalty, but personalty to what extent? Only to the extent of accomplishing the purpose of the conversion, namely, the equity of the partners to have the joint debts and their own advances paid before any part goes to the other partners or their separate creditors. In *Dyer v. Cornell*, 4 Barr, 359, where by order of the Orphans' Court, the land of minors was sold for their maintenance and education, it was held that the proceeds, supposing them to retain the character of land, lose that and become personalty on the first transmission, though to an infant. The administrator of the minor was decided to be entitled to the money as money. The court, indeed, were of opinion that the sale, *ipso facto*, worked a transmutation, but they added, by Coulter, J.: "But even admitting that the money in this case bore the impress of real estate, and the inheritable qualities peculiar to lands and houses, in analogy to the case of *Lloyd v. Hart*, 2 Barr, 473; for how many generations or descents shall it wear that complexion? It must cease, as it min-

gles with other moneys of the distributee; otherwise uncertainty, confusion, and litigation will indelibly mark its character. This court is of opinion that it cannot be carried further than the first descent in any case." The same question is pertinent in regard to the land in the present case. If land remaining in specie after the partnership is dissolved and wound up, and all the purposes of its conversion answered, is still personal estate, how long is it to remain so? Certainly all the forms of the law as to realty must be observed in its transmission from hand to hand, and shall it not be subject to the lien of judgments in the lifetime, and debts upon the decease of its owner? If not, uncertainty, confusion, and litigation will indelibly mark its character. But it may be asked, when is the precise moment of its reconversion? The answer is, the moment the partnership is wound up, either by decree, judgment or agreement, and it is determined that it no longer forms a part of the partnership stock, and is not required for its purposes. In *Burr v. Sim*, 1 Whart. 252, where land was ordered to be converted by will, and the proceeds to be paid to a legatee, it was held, that the election by the legatee before any sale, to take the land as land, operated as a new acquisition. It was a purchase of it as land by a surrender of the right which he undoubtedly had to consider it as money. Where, then, a partnership is dissolved, wound up, and completely

ended, what can it be but an election of the land as land, and the reconversion of it."

Election.—It is well settled, that the party, or all the parties, interested, may elect to take the property in that character, from which the testator has directed it to be converted; and upon such election being declared, the property is converted back into its original condition. Land ordered to be sold, if the parties elect to take it as land, becomes real estate again and is bound by a judgment; *Stuck v. Mackey*, 4 Watts & Sergeant, 196; *Shallenberger v. Ashworth*, 1 Casey, 152; *Brownfield v. Mackey*, 3 Id. 320; *Beal v. Stockly*, 9 Harris, 336; *Broome v. Curry*, 19 Alabama, 805. The property is considered in equity as being completely converted, upon the testator's death, and as continuing in that state, until competent parties, by legal and sufficient acts or declarations, determine their election to have it in its former character. This right of election, is given merely for the convenience of the parties, and upon the ground, that as they might, after an actual conversion, reconvert the property into its former quality, equity will for their benefit, and upon a proper manifestation of their intention, consider the re-conversion as affected. "Where the whole beneficial interest," says Washington, J., in *Craig v. Leslie*, 3 Wheaton, 564, 578, "in the money in one case, or in the land in the other, belongs to the person for whose use it is given, a court of equity

will not compel the trustee to execute the trust against the wishes of the *cestui que trust*, but will permit him to take the money or the land, if he elect to do so before the conversion has been actually made; and this election he may make, as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity. It is this election, and not the mere right to make it, which changes the character of the estate so as to make it real or personal, at the will of the party entitled to the beneficial interest." "This right of election," says Gibson, J., in *Allison v. Wilson's Executors*, 13 Sergeant & Rawle, 330, 333, "must be exercised before the property is converted; and until it be actually exercised, the property bears the same character, and remains subject to the same rules of transmission to representatives as if the conversion were actually made." "Land once impressed with the character of money," says Rogers, J., in *Burr v. Sim*, 1 Wharton, 252, 265, "must remain so impressed, until some person elects to take it in its original character as land. . . . It is certain, that the devisee may take it himself in the shape of land or money; but when there has been a conversion in the contemplation of the court, the *onus* of showing that the property ought to pass under a different denomination, by proving an act in the donee, indicating his intention to that effect, lies on the party who claims it in its original state." The principle is the same, whether

the right of election is implied or given in terms, and a direction to distribute the proceeds will work a conversion, notwithstanding a provision that the legatees may take the property as land; *Pratt v. Taliaferro*, 3 Leigh, 419.

An infant cannot make an election so as to change the character of property, nor can his guardians; *Burr v. Sim*, 1 Wharton, 252, 265: though a court of equity may elect for him; *Turner v. Street*, 2 Randolph, 404; *Pratt v. Taliaferro*, 3 Leigh, 419, 428. A feme covert cannot elect, by a simple declaration or act *in pais*; and it has been held in Virginia, that her husband cannot elect for her, but that she may make a valid election under a commission from the court of chancery, directing her privy examination separate and apart from her husband: by analogy to the solemnities attending the levy of a fine in England, or the privy examination of a feme covert in that state; *Pratt v. Taliaferro*, 3 Leigh, 419, 429, 432; *Siler, Price & Co. v. M'Clanachan et als.*, 2 Grattan, 280, 296: in Kentucky, also, it is considered, that where the testator's will has made a conversion of land into money, the husband of a feme covert cannot have the property conveyed to him so as to deprive his wife of her equity to a settlement; *Samuel v. Samuel's Administrators, Heirs, &c.*, 4 B. Monroe, 245, 257. In Pennsylvania, however, it has been decided that where land is directed to be sold, and the proceeds, or a part of them, to be given to a feme covert, the right of election is in

the husband, who may take the property as land vesting in the wife or in himself, as he pleases; *Hannah v. Swarner*, 3 W. & S. 224, 231; *Beal v. Stockley*, 9 Harris, 376; *Shellenberger v. Ashwater*, 1 Casey, 152. An election can be made only by all the parties interested: a part cannot, without the co-operation of the rest, change the character which the testator has fixed upon the property; *Allison v. Wilson's Executors*, 13 Sergeant & Rawle, 330, 333; *Willing v. Peters*, 7 Barr, 287, 290; *Miller v. Meetch*, 8 Id. 417; *Pratt v. Taliaferro*, 3 Leigh, 419, 428; *Beatty v. Byers*, 6 Harris, 105; *Foreman v. Foreman*, 7 Barb. 215; *Evans' Appeal*, 13 P. F. Smith, 183.

Election depends upon the intention of the parties interested; and it may be determined by slight acts, if they be such as to manifest intention unequivocally; *Pratt v. Taliaferro*, 3 Leigh, 419, 428. If land be directed to be sold, and the proceeds distributed among certain persons, and they all unite in a conveyance of the property, as land, it is an election to take it as land; *Smith v. Starr*, 3 Wharton, 62, 65; *Rice v. Bixler*, 1 Watts & Sergeant, 445, 455; and the same result will follow from a conveyance by one of his share to the others, if accepted by them; *Beal v. Sheahly*, 9 Harris, 376, or from a devise of the property as land, by the party beneficially interested; *Burr v. Sim*, 1 Wharton, 252, 265. An agreement among all the parties to hold the land in the proportion of the money bequeathed to them, will also be a

binding election to take as land; *Hannah v. Swarner*, 3 Watts & Sergeant, 224, 231. And election may be proved as any other matter *in pais*, and a parol agreement to take as land, and an entry and possession accordingly, will be sufficient; *Stuck v. Mackey*, 4 Id. 196. An election cannot, however, be deduced from silence in the absence of circumstances making it a duty to speak, and the burden of proof lies on those who allege, and not on those who deny that such a choice has been made; *Miller v. Meetch*, 8 Barr, 417; *Beatty v. Byers*, 6 Harris, 105; *Evan's Appeal*, 13 P. F. Smith, 183.

Where an absolute equitable conversion has taken place, as where land is devised to trustees, to be sold, and the money arising therefrom to be distributed, and the party interested is the heir, and he elects to take it as land, he takes by purchase and not by descent; and the land, in his hands, is regarded as a new and original acquisition. For, the effect of an election is not to discharge, or annul the conversion directed by the testator, but to consider the land as actually converted under such direction, and then actually re-converted by a new purchase on the part of the beneficiary. By election, chancery regards the re-purchase as really made, and with all the consequences of an actual re-purchase. In *Morrow v. Brenizer*, 2 Rawle, 185, 189, a sale of land for distribution among children had been directed by the testator. "It was necessary to the purposes of the will," said Gibson, C. J.,

"that the quality of their interest should be changed; and they could, therefore, take only by purchase. They might, indeed, have elected to take the land itself, instead of the price of it. But their right, in this respect, is a consequence of their power to control the event, being the only parties beneficially interested. As they can produce the same result, by purchasing at the sale of the trustees, chancery considers them as having an equitable estate in the land, and directs the trustees to convey the title, the moment they signify an intention to call for a conveyance; an actual sale being dispensed with, as an unnecessary formality. But, even then, an estate in the land is not vested by descent, but by an act of their own, which is equivalent to a purchase." In *Burr v. Sim*, 1 Wharton, 252, 266, where a testator devised his real estate to be sold and the proceeds given to his son and heir, and the latter elected to take the devise as land, it was decided that he was in by purchase and not descent, and that the lands went to his heirs *ex parte maternâ* as well as those *ex parte paternâ*. "Did this property in legal contemplation as land, come to the devisee from his father?" said Rogers, J. "We think it did not. It came to him impressed with the character of money. It was by an act of his own that it was reconverted into land. The very act of election implies a choice between the two species of property, and effects a change in the nature of the property itself. If the property had been sold by the

executors in pursuance of the directions of the will, and the devisee had become the purchaser, as he might, there can be no doubt that it must be viewed in the light of a new acquisition. Where then can be a difference, when by an act of his own he elects to consider that as land, which otherwise has the impress fixed upon it as money? It is a purchase of it as land, by a surrender of the right which he undoubtedly had to consider it as money."

Real estate which has been turned into personalty by a contract of sale, may be reconverted by rescinding the contract, or through a forfeiture arising from the failure of the vendee to pay the purchase-money; *Leiper v. Irvine*, 2 Casey, 54; but such a re-conversion will not impair any right that he has vested during

the interval; *Leiper's Appeal*, 11 Casey, 420; *Rose v. Jessup*, 7 Harris, 81. In *Rose v. Jessup*, Lowrie, J., said, that the testator having "entered into a valid agreement for the sale of his real estate, the sums due thereon were part of his personal estate, and on his death his widow's interest therein became immediately vested." "It was the duty of the trustees to proceed on the agreement, and collect the money for those having a right to claim it. If such pursuit should result in recovering back the land, they were bound to account for that as a substitute for the money, and subject to the same trusts. It follows that when the contract is not rescinded until after the vendor's death, his widow will take the absolute estate in the land which she would have had in the personalty." *Leiper's Appeal*.

*ACKROYD v. SMITHSON.¹

[*872]

LINCOLN'S-INN HALL, MARCH 4, 1780.

REPORTED 1 BRO. C. C. 503.

RESULTING TRUST ON FAILURE OF THE PURPOSES FOR WHICH CONVERSION HAS BEEN DIRECTED.]—*Testator gave several legacies, and ordered his real and personal estate to be sold, his debts and legacies to be paid out of the proceeds arising from the sale, and the residue thereof he gave to certain legatees, in the proportion of their legacies. Two of the residuary legatees died, living the testator. These shares are lapsed; and, so far as they are constituted of personal estate, shall go to the next of kin, and so far as they are constituted of real estate, to the heir-at-law.*

CHRISTOPHER HOLDSWORTH, by his will gave (int. al) to the defendants, Smithson and Ibbetson, their executors and adminis-

¹ This report was copied by Mr. Brown from the notes of Lord Eldon—from Lord Redesdale's MSS.

trators, 200*l.*, in trust to put the same out at interest, and to apply the interest in bringing up the defendant Mary Bracklebank, then an infant, till twenty-one, the principal to be paid to her at twenty-one, and, if she died before twenty-one, then to be paid to her representative: and bequeathed to the Rev. Thomas Whitaker, 100*l.*, to James Roberts and William Roberts, 100*l.* each; to Grace Ogle, 200*l.*; to George, Ann, and Phœbe Ogle, her children, 100*l.* each; to Joseph Scurr, 200*l.*, to Benjamin Wright, 200*l.*, to Mrs. Molyneaux, 400*l.*, to Hannah Close, 150*l.*, to William Hawkeswell, 100*l.*, to Mary Ross, 200*l.*, to Joseph Marshall, 200*l.*—all which legacies, together with other legacies given by his will, he directed to be paid at the end of six months after his decease; and the said testator thereby gave all his messuages, cottages, lands, tenements, [*873] and hereditaments, *situate at the Bank, in the township of Leeds, with their appurtenances, and all his real estate not thereinbefore devised, and all his household goods and furniture, plate, linen, stock in trade, and all his personal estate whatsoever, unto the defendants Smithson and Ibbetson, their heirs, executors, administrators, and assigns, to hold the same to them, their heirs, executors, administrators, and assigns, for ever, *in trust that they should, as soon as convenient after his decease, sell all his said messuages, &c., for such price or prices as could be got for the same, and thereby to convert such real and personal estate so to them devised, and every part thereof, into ready money, and by and out of the money arising by such sale to pay all his debts, legacies, and funeral expenses, and charges of proving his will; and after payment thereof, and retaining to themselves 50*l.* each, which he thereby gave them for their trouble, in trust out of such monies to arise as aforesaid, to pay all legacies and annuities thereby bequeathed, at the time and in the manner thereby directed; and if, after such payments made, and putting out of the funds, as thereby directed, for raising the annuities thereby given, and indemnifying his trustees from all charges, expenses, and loss which might attend the carrying the trusts of his will into execution, there should remain an overplus in the hands of the trustees, which he apprehended there would be to a considerable amount, he directed that they and the survivors of them should, within six months after the same should be ascertained, pay the same unto his said legatees, Thomas Whitaker, James Roberts, William Roberts, Grace Ogle, George Ogle, Ann and Phœbe Ogle, Joseph Scurr, Benjamin Wright, Mrs. Molyneaux, H. Close, William Hawkeswell, Mary Blacklebank, Mary Ross, and Joseph Marshall, in proportion to their several and respective legacies therein to them bequeathed; and the testator thereby willed and devised that two several sums of 250*l.* each, which he had therein directed to be put out on securities in the names of his trustees, and the interest arising therefrom to be respectively paid [*874] to M. Thackeray *and R. Gaunt during their respective lives, should, upon the several deaths of them the said M. Thackeray and R. Gaunt, be paid in the like proportions unto them his said several and respective legatees.*

Benjamin Wright and Mrs. Molyneaux died in the lifetime of the testator.

The bill was filed by the next of kin of the testator against the surviving legatees and the heir-at-law, claiming the legacies given to the deceased legatees, their shares in the overplus, and in the two sums of 250*l.*, as lapsed and become part of the personal estate of the testator.

The cause came on at the Rolls, 10th July, 1778, when his Honor (Sir Thomas Sewell), being of opinion that the surviving legatees took the whole residue, in proportion to their several legacies, dismissed the bill without costs.

From this decree the plaintiffs appealed to the Lord Chancellor Thurlow, and, the cause coming on to be heard before his Lordship,

Mr. Kenyon attempted to support the decree.

But Lord Chancellor Thurlow being clear (without hearing much argument) that this was a tenancy in common in the residue, and that therefore, the shares of the legatees who died in the testator's lifetime were undisposed of, said the only question was, whether such shares belonged wholly to the next of kin or to the heir-at-law.

The *Attorney-General*¹, Mr. *Madocks*, and Mr. *Selwyn* (for the plaintiffs, the next of kin), contended, that the testator had converted his real estate into money out and out; that he had mixed two funds, and made all personal estate; that the cases, therefore, of *Mallabar v. Mallabar* (Cas. temp. Talb. 79), and *Durour v. Motteux* (1 Ves. 320), must govern the decision here, and that the blending the funds distinguished this case from that of *Digby v. Legard* (cited 1 Bro. C. C. 501). Mr. Selwyn mentioned the cases of *Flanagan v. Flanagan* (cited 1 Bro. C. C. 500), *Fletcher v. Ashburner* (1 Bro. C. C. 497), and *Ogle v. Cook* (cited 1 Bro. C. C. 501). [*875]

Lord Chancellor Thurlow thought the two former cases did not apply, but being in general of opinion with the counsel for the next of kin, asked the counsel for the heir-at-law upon what grounds they could support his claim.

Mr. *Scott*², for the heir-at-law, said, they claimed on his behalf such interest in the monies produced by the sale of the testator's real estates, as the deceased residuary legatee would have been entitled to, if they had survived the testator; or so much of their shares of the overplus, now in the events which have happened, undisposed of, as is constituted by the produce of the testator's real estate. That the heir-at-law is entitled to every interest in land not disposed of by his ancestor, is so much of a truism that it calls for no reasoning to support it. It is not necessary for the heir-at-law to deny that the intention of the testator has designed him

¹ Alexander Wedderburne, Esq., afterwards Earl of Rosslyn.

² Afterwards Earl of Eldon, from whose notes this argument was taken.

nothing; his intention has certainly been equally unpropitious to his next of kin; but it is not enough that the testator did not intend that his heir should take: he must make a disposition in favour of another; if he has not actually disposed of all his real estate, if he has not made an universal heir, the law will give such part of his real estate as he has not actually and eventually disposed of, even against his intention, and a fortiori in a case where he has expressed no intention, to the hæres natus. If the interest of the deceased legatees had been an interest in the produce of mere real estate, not blended with the produce of personal estate, it has been admitted, upon both hearings, that the benefit of lapsed devises would, according to the case of *Digby v. Legard*, and the principle of the case of *Emblin v. Freeman*, Prec. Ch. 541, and of many others, have accrued to the heir-at-law. It is admitted, and cannot be denied, that where a testator directs real estate to be sold for special purposes, if any of those purposes become incapable of taking effect, the heir-at-law [*876] shall take; because there is an end of the *disposition when there is an end of the purposes for which it was made; but it is contended here, the testator had not a special intention, but that he meant the produce of his real estate should be considered as personal estate; that he intended to convert it out and out; that he has not kept the funds distinct, but that he has blended them so as to be incapable of being distinguished, and that the cases, therefore, of *Durour v. Motteux*, and *Mallabar v. Mallabar*, are authorities in point, that the whole fund is personal. We admit that a person may decide what shall be the nature of his property after his death, so as to preclude all question between real and personal representatives. But we insist, that if he has not actually and eventually so decided, they, upon whom the law casts the title to personal estate, can no more claim in a court of equity money arising from the sale of land, than the heir can claim property admitted to be of a personal nature. As to the question of fact, whether he meant that, in some event only, or that, in all events, the produce of his real estates should be considered as personalty, we admit that, in favour of his residuary legatees, he meant to convert the whole into personalty, in case all his residuary legatees should eventually take the whole; but we contend, that he has intimated no intention as to that part of the produce, as to which his disposition, in the event which has happened, was failed of effect. He converts it out and out, indeed, if you speak of his intention as to the qualities of the property, which his legatees were to take; but, as to such part of the property as, in the event, they have not taken, he has not determined upon its nature; he never meant to determine upon its nature, as between his heir-at-law and his personal representative or next of kin, because he appears not to have adverted to the possibility of any events taking place, which would give the one or the other an interest in his property, and he designed no part of his property part for either. In the event, the one or other must take some

of it; but, to say he has made it all personal property, and that therefore the law must give it *to the next of kin, [*877] is to apply an argument deduced from what was the testator's intention in case events had taken place which had not occurred, for the sake of proving a similar intention, if circumstances happened directly contrary to those with relation to which only the testator framed his intention. To argue from what the testator intended with respect to residuary legatees, by way of proving that he intended the same in favour of his next of kin, is to reason from a case in which intention is expressed, to prove a like intention in a case which supposes the absence of intention; though the testator, therefore, intended that his legatees, if they had lived, should take their respective shares of such part of the general surplus as was produced by the sale of the real estates as money, he has not declared any intention relative to its nature, in case that particular intent of his should be disappointed. In the event, therefore, which has happened, it is so much money undisposed of, arising from the sale of lands. Such money in this court is land, and as such the heir claims it. Suppose all the fifteen legatees had died in the lifetime of the testator, would it not have been competent to the heir-at-law to have insisted in equity, that no sale should be made of the real estate? Would it have been possible to contend that, because the testator had blended the funds, in order to make a disposition which never took effect, and without a view to any other given circumstances, that he had therefore blended them, if, in the event, he had made no disposition; that, because he had made the real estate personal, to give it to his residuary legatees, and disappoint his heir, he meant also to disappoint his heir, whether his residuary legatees did or did not, in the event, take the benefit of that disposition? The fact of his having blended the funds proves not a mere inattention, not mere indifference to the interest both of his next of kin and his heir-at-law, but it proves a purpose hostile to both. Can that fact, then, be a ground from whence to infer that, in a change of circumstances, he had a purpose of kindness and bounty to the next of kin, and *adverse to the interest of the heir only? [*878] The reason of the intention ceasing, the intention should be taken to have ceased. The testator meant to change the legal qualities of his property, when he meant to alter the disposition which the law would make of his property; but if, in the event, the law was to make the disposition of any part of the property, he meant, for aught that appears to the contrary (and something must appear to the contrary, to defeat the claim of the heir), that the law which made the disposition should decide on the qualities of the property of which it was to dispose. If, then, in case all the residuary legatees had died, the heir could have prevented a sale, is it to be said, that, because a sale must be made, he shall not have that part of its produce which the objects of the testator's bounty cannot take? It is not true, that where it is necessary that a sale should be made, to effectuate the testator's purposes which are

capable of taking effect, that such sale will convert the nature of that part of its produce which cannot be applied according to the testator's intention. In the case of *Emblyn v. Freeman* (Prec. Ch. 541), the heir was held entitled to 200*l.* arising from the sale of real estate which the testator had made liable to an appointment by note, concerning which he made no appointment; and there a sale was necessary. In the case of *Digby v. Legard*, where the heir was held entitled to the benefit of the devise, lapsed by the death of one of five tenants in common, of money to be raised by sale of real estates in the lifetime of the testator, the heir could not possibly prevent a sale; as to the cases of *Mallabar v. Mallabar*, and *Durour v. Motteux*, they can be considered as authorities only by those who do not attend to the distinction submitted above; they are so far from deciding the case, that they establish no principle which applies to it. In *Mallabar v. Mallabar*, the real and personal estate are not blended by the terms of the devise in the beginning of the will, which is a devise of real estate only, upon trust to sell, and that, out of the monies arising therefrom, the [*879] testator's debts should be paid; and after *payment thereof he devised, out of the remainder of the money, 500*l.* to his sister, Mary Bainbridge; 500*l.* to his sister's two children that should be living at the time of his decease, equally to be divided between them: 500*l.* to his nephew, Nicholas, who was his heir at-law; 500*l.* to be divided amongst the children of his late brother, James Mallabar, living at his decease. Then follows the clause which was held to blend the funds:—"Item, after all my debts and legacies paid, I give and bequeath all the rest and residue of my personal estate unto my sister Esther Mallabar, and appoint her executrix." The question was, whether there was a resulting trust for the heir, as to the money arising from the sale of the real estate, after payment of the debts and the several sums of 500*l.* The Court held, that the testator had made all his property personal; or rather, it inferred, from the purpose of the testator, as far as that could be collected from the will, that the testator meant by the residuary clause, to describe not only money strictly personal estate, but the money claimed by the heir likewise: the Court inferred this from the circumstances of the heir's having a legacy of 500*l.* out of that very money, and because, if a different construction was made, the sister, his executrix, to whom the testator clearly intended to give a beneficial interest, would have taken nothing but a troublesome office: for if the words, "the residue of the personal estate," did not include this money, the personal estate must have been first applied to pay the debts and legacies, in exoneration of the real estates charged therewith by the will, and the executrix would have had an office of trouble, without the benefit intended her. But, though the Court considered the surplus of the money as personalty, as between her (whom it held to be a residuary legatee) and the heir, to effectuate the testator's intention, does it follow that, if the testator had died intestate as to the surplus, as the testator

here did as to a part of it, that the Court would have determined against the heir, in favour of the next of kin, in whose favour no such argument as to intention could *have been urged? [*880] If the residuary legatee had died in the testator's lifetime, the will must have had the same construction as if the residuary clause had not been inserted; for, where the residuary clause has no operation to any substantial purpose, it cannot be considered as a part of the will; if it had not been inserted, the devise of the real estate would have been a devise to pay debts and legacies merely. In such case, then, it is clear that, as to the surplus, there would have been a resulting trust for the heir; the debts and the sums of 500*l.* being paid, the testator's intention would have been satisfied to the extent in which it could take effect; there would then have been an end of the disposition. There is no difference between such a case and the present case, except that, in that case, there is no residuary legatee as to any part of the surplus; here, there is none as to some part of it: there, there is a general intestacy as to the surplus—here, a partial intestacy: but the effect of a partial intestacy must be the same as to the part, as the effect of a general intestacy is to the whole. The case of *Durour v. Motteux* is also a case between residuary legatees and the heir-at-law. There the testator gave all his real estates, to sell and dispose of the whole with his personal estate, blending them for payment of his debts, legacies, and funeral expenses, and performance of his will; he gave several legacies, and among the rest 1200*l.*, or thereabouts, whereof part was to be laid out in the purchase of freehold lands for charitable uses, some of which were confessedly within the Mortmain Act¹, and the rest determined to be so; the question was whether the 1200*l.* should go to the heir-at-law, or to the residuary legatees. Lord Hardwicke said, that he was of opinion that the money which should arise by the sale of the real estate was turned into personal, and so intended by the testator, it plainly appearing that by the description of all his personal estate, he meant to include the whole in the residue, so that it is to be considered now as personal estate; then it comes to this: a will is made in which there are several legacies, and the residue of the *personal estate is given away; one of the [*881] personal legacies is void by law; the Court cannot say, for that reason, that he intended to die intestate, for giving the residue over includes everything, let it fall in by reason of the legacies being void, or lapsing in the life of the testator. Now here the reasoning of the Court is grounded upon the testator's intention to give his residuary legatees everything which was not otherwise effectually disposed of. And the testator was held to have converted his real estate out and out into personal estate, to effectuate that intention; for the residuary legatees could not otherwise take the 1200*l.* But if the residuary legatees had died in the lifetime of the testator, and the next of kin had been called

¹ 9 Geo. 2. c. 36.

upon to sustain the question against the heir, the reasoning of the Court would not apply; arguments from intention in their favour could not be resorted to, and the Court might have said, and must have said, that the testator meant to die intestate as to the surplus, if there was no residuary legatee named in his will living at his death. It could not in that case have been said that the testator meant, by the description of all his personal estate to include the whole in the residue, and therefore the void legacy of 1200*l.* among the rest, because the will, in that case, must be considered as if nothing concerning the residue had been inserted in it. Here he meant to make one fund of the whole, to effectuate his intended disposition of the whole; but if subsequent events defeated that disposition, his intention in case it took effect, is no proof that he had the same intention in case it did not take effect. If there had been no residuary clause, and if the residuary legatees had been dead, it could have no effect, and therefore could not have been attended to. In *Durour v. Motteux* it would have been nothing more than a devise of real and personal estate for payment of debts, valid legacies, and funeral expenses: it would have been then a disposition with a special intention: that intention being satisfied, there would have been a resulting trust as to the surplus. It is said, if this way of reasoning was good, it [*882] would have *entitled the heir to the 1200*l.* in the case of *Durour v. Motteux*; for it was the testator's intention there, that the same sum should be considered as money only in the case the charity took it; that the testator never adverted to the event which happened—viz., the residuary legatees taking it—an event which he as little thought of as he did of the next of kin's taking the residue. The answer is, the rule of law would not suffer, in that case, what no rule forbids in this; the law says, where there is a residuary legatee, the testator shall be presumed to mean that he should take whatever lapses, either by the death of the legatees, or whatever is not given according to law¹. So long as there is any person to take, who is declared by the testator to be preferred by him to those whom the law appoints to succeed him, the heir can have no claim. If the testator spoke for himself he would say, If my special intention of kindness to the charity fails, my general intention of bounty to my residuary legatee shall take place; but where the residuary legatee is removed, there is nothing like a declaration by the testator in favour of the next of kin, to entitle them to succeed the residuary legatees, as there is where there is a general residuary clause in a will in favour of the persons named in it, to succeed the particular legatees; and to money arising by the sale of land, there can be no claim in the next of his kin but what arises from the declaration of the testator; for unless he directs or expresses that it shall be considered as personalty, the heir must take it. We admit the heir, then, to be excluded whilst there are

¹ See *Cambridge v. Rous*, 8 Ves. 23; *Slackford v. Long*, 7 Ir. Ch. Rep. 87.

any persons who can take the produce of the real estate under the will,—the declaration of the testator's intention: we deny that he is excluded by any who make their claim not under the will, but in defect of the will: or that the intention in the will can affect those who claim, upon the ground that there is no will which relates to the subject. The case of *Cruse v. Barley and Banson*, before Sir Joseph Jekyll (3 P. Wms. 20), seems to establish those principles, for it shows that where any part of the produce of the real estate is so given as to prove that it was not the *testator's intention, in case that part should lapse, that it should go to the residuary legatees, but that he has given them the residue exclusive of that part, it shall not go as undisposed personalty to the next of kin. Why should the next of kin take, in preference to the heir, what the residuary legatees cannot take for another reason—namely, removal by death? The case was: William Banson, seised in freehold and copyhold lands, which he had surrendered to the use of his will, and being much indebted by mortgages, and having a wife and five children, devised all his freehold and copyhold lands to the defendant Barley and his heirs, in trust to sell for the best price, and in the first place to pay off all his incumbrances and his debts. He also devised his personal estate to the same trustee, in trust to sell, and after the testator's debts paid, to apply the money arising by sale of the personal estate, and also the money to be produced by sale of the real estate, among his five children, in manner thereafter mentioned: to his eldest son 200*l.* at his age of twenty-one, all the rest and residue thereof among his four younger children at twenty-one, and with benefit of survivorship. The eldest son died under twenty-one; the question was, what was to become of the 200*l.*? The Master of the Rolls thought it would not go to the younger children, who were only to have the residue, but to the heir. It was objected, that all is made personal estate; the surplus of the money arising from the sale of the real and personal estate, is to go to the *hæredes facti*. There could be no doubt, it was urged, if the eldest son had died in the testator's life, it would have been a lapsed residuum: but his Honor, after looking into precedents, declared for the heir, that it was the same as if so much land as was of the value of 200*l.* had not been to be sold, but suffered to descend. As to the case of *Flanagan v. Flanagan*, it is perfectly different from this; that was a question between the real and personal representatives of a person entitled under the will of the testator. The land was sold under a decree of the Court, in a cause in which the person, through whom both claimed, was party; *and the decree had ordered the surplus, if there should be any, to be paid to James Flanagan, the father, and James Flanagan, the son, equally. The sale was made under the decree; and, the question arising between the real and personal representative of Flanagan, the father, the Court determined the surplus should have the same nature with respect to them as

the decree had given it with respect to Flanagan, the father. In that case, too, the testator had, foreseeing that a sale could not be made which would produce the exact sum and no more, directed his trustees to convey the residue of the real estate which should remain unsold, or pay the produce of such part as should be sold, and all other the residue of his real estates between the father and the son.

Scudamore v. Scudamore (Prec. Ch. 513) is not to this point: it determines, that the representatives of a person entitled under a will, shall take money, as money or as land according as the person whose representatives they are would have taken it; but it decides nothing between the heir and personal representative of the testator himself. There is no case in which the next of kin have been considered as entitled against the heir, in the event of a lapse of the whole or a part of the residue, except the case of *Ogle v. Cooke*,¹ heard 19th February, 1748, which so far as it relates to this subject was this: Mr. Ogle made his will in 1744, and gave his real estate to trustees to sell and vest the money in stock, and pay the interest to his wife during her widowhood, and, after her death or marriage, the principal to his two daughters equally, except that the eldest was to have 1000*l.* more than the other: he gave the residue of his personal estate in the same way. He afterwards executed a conveyance, in trust to sell for payment of his debts, which was held a revocation *pro tanto* only, and part was sold. One of the daughters died in Mr. Ogle's life. The bill was brought by the widow and the eldest daughter, against the son, the heir, and the trustees, to have the residue of the estate sold, and claiming the share of the deceased daughter [*885] as personal estate of Mr. Ogle, to be divided *between them and the son. The son insisted that her share was to be considered as real estate: the Court decreed the residue of the estate to be sold, and that the produce should be considered as Mr. Ogle's personal estate. Here it cannot be denied, that the intention of the testator to convert this estate into money, for the sake of his daughters, was taken to be a sufficient ground for the Court's considering the moiety, which in the event was undisposed, as personal estate: but the case of *Digby v. Legard* is a later authority, and contradicts the doctrine of that case. The cases are not in any respect different, except in the number of persons interested in the produce. The daughters, in the case of *Ogle v. Cooke*, indeed, had an interest in the personal as well as real estate, which was not given in that of *Digby v. Legard*; but the funds are kept separate, and not blended, in *Ogle v. Cooke*. The determination in the latter case, we submit, is neither justified by principle nor by authority. The case of *Ogle v. Cooke*, admits the deceased daughter's moiety, in both the real and per-

¹ See *Collins v. Wakeman*, 2 Ves. jun. 686, where Lord Loughborough says, that he had caused the Reg. Lib. to be examined, and it was found that the point supposed to have been decided by *Ogle v. Cooke*, was in reality left undecided. It is, therefore, no longer an authority.

sonal funds, to be undisposed, but it supposes that the conversion, which the testator made with a view to a disposition, is to take effect, though the disposition does not take effect. Upon the whole, we contend that, if the shares of the deceased legatees in the overplus are undisposed, parts of those shares being constituted by money arising from the sale of real estate, the heir is entitled to such part; that the intention of the testator, in the events that have happened, does not destroy his claim; and that this is a case to which the principles of the adjudications cited by the counsel for the next of kin, do not apply.

Lord CHANCELLOR THURLOW reversed the decree, and directed an account to be taken of the personal estate, and the money arising from the sale of the real estate, and that the share of the deceased legatees in the overplus should be divided between the next of kin and the heir; that is, so much of those shares as was constituted of the personal estate, to the next of kin, [*886] and so much as was made up of the produce of the real estate, to the heir.

He said that he fully approved the determination in *Digby v. Legard*. That he used to think, when it was necessary for any purposes of the testator's disposition, to convert the land into money, that the undisposed money would be personalty; but the cases fully proved the contrary. It would be too much to say, that if all the legatees had died, the heir could, as he certainly might, he said, prevent a sale, and yet to say that, because a sale was necessary, the heir should not take the undisposed part of the produce. The heir must stand in the place of the residuary legatees who died, as to the produce of the real estate. He said, he approved the distinctions made in behalf of the heir, and decreed as before.

Since the case of *Ackroyd v. Smithson*, so celebrated for the elaborate argument of Lord Eldon, then Mr. Scott, it has never been doubted, that, where a testator directs real estate to be sold, and the produce of the sale to be applied for a purpose which either wholly or partially fails, the undisposed of beneficial interest will result to his heir-at-law, and will not go to his next of kin, although the land may have been actually converted into money. In *Ackroyd v. Smithson*, it will be observed that the disposition of the money to arise from the sale of the real estate was originally complete, but a lapse by the death of two of the residuary legatees in the lifetime of the testator, caused the failure of the disposition as to their two shares, which, although actually converted into money, resulted to the heir-at-law as undisposed of real estate.

So likewise where money impressed with the character of realty, passes under a general devise, although there be a trust for sale, it will

operate merely as a conversion for the purposes of the will, and upon a lapse of a share taking place on the death of one of the devisees, it will result for the benefit of the heir-at-law, and not the next of kin of the testator. In *Re Taylor's Settlement*, 9 Hare, 596, 604. See also *Salt v. Chattaway*, 3 Beav. 576.

Upon the same principle, where a partial disposition only is originally made of the money to arise from the sale of land, the portion undisposed of will result to the heir-at-law: *Robinson v. Taylor*, 2 Bro. [*887] C. C. 589; *Berry v. Usher*, 11 Ves. 87; *Wilson v. Major*, 11 Ves. 205; *Watson v. Hayes*, 5 My. & Cr. 125.

The same result follows where money arising from land directed to be sold is given over on an event which does not happen. Thus, in *Jessop v. Watson*, 1 My. & K. 665, a testator directed a mixed fund, composed of the produce of his real and personal estate, to be applied to certain specified purposes, and the residue to be divided equally among his children, or child, at twenty-one, if sons, and twenty-one or marriage, if daughters, and if there was no child who should become entitled under the trusts, to such person as he should by his codicil appoint. The testator died without having made a codicil, leaving an only daughter, his heiress-at-law, who died under twenty-one, intestate and unmarried. Sir J. Leach, M. R., held, that so much of the residuary fund as was constituted of real estate descended to the heiress, and that so much as was constituted of personal property went to the next of kin. See, also, *Fitch v. Weber*, 6 Hare, 145; *Roberts v. Walker*, 1 Russ. & My. 752.

So, also, where land is directed to be converted into money, and the whole, or part, is given for a purpose which fails on account of illegality, the whole or part which, on this account, remains undisposed of, results to the heir-at-law. As, for instance, where money, to arise from the sale of land, is given to a charity, and the gift is void according to the Statute of Mortmain (*Attorney General v. Lord Weymouth*, Amb. 20; *Jones v. Mitchell*, 1 S. & S. 294; *Hopkinson v. Ellis*, 10 Beav. 169), or is limited so that the bequest is void, as violating the rule against perpetuities (*Burley v. Evelyn*, 16 Sim. 290; *Buchanan v. Harrison*, 1 J. & H. 662). So, where, as in *Eyre v. Marsden*, 2 Kee, 564, accumulations are directed to be made out of the income of land to be converted into money, for more than twenty-one years from the death of the testator, and therefore void under the Thelluson Act (39 & 40 Geo. 3, c. 98), as to the excess of the accumulation over the twenty-one years, such void accumulations will result to the heir-at-law, and not to the next of kin. "It happens," observes Lord Langdale, M. R., in *Eyre v. Marsden*, "that there is a failure of the testator's intent. The income of the money arising from the sale of the real estates cannot be allowed to accumulate, and applied as the testator meant. The purposes of the will, as far as they can be lawfully carried into effect, do

not exhaust the whole beneficial interest arising out of the real estate, and I think that the heir is entitled to the unexhausted interest." See *S. C.*, 4 My. & C. 231.

The principle upon which these cases proceed has been thus laid down by Lord Eldon; "Where," *says his Lordship, "a tes- [*888] tator means, with regard to a particular purpose, to convert his real estate into personal, if that purpose cannot be served, the Court will not infer an intention to convert the estate for any other purpose not expressed:" *Hill v. Cock*, 1 V. & B. 175; and see *Bective v. Hodgson*, 10 Ho. Lo. Ca. 656; *S. C.*, nom. *Hodgson v. Bective*, 1 Hem. & Mill. 376.

In *Ackroyd v. Smithson*, it was argued, for the next of kin, that the fact of the testator having mixed the real with the personal estate, showed an intention on his part to convert the real into personal estate out and out, for all intents and purposes, and not merely for the purposes of the will. This argument, however, was most successfully refuted by Lord Eldon, who, admitting that it was the testator's intention to convert the real into personal estate, out and out, for the purposes of the will, that is to say, for the residuary legatees, contended, that it was impossible to infer from such intention in favour of the residuary legatees, a similar intention in favour of the next of kin, whom the testator never had in contemplation; and that to argue from what the testator intended with respect to residuary legatees, by way of proving that he intended the same in favour of the next of kin, was to reason from a case in which intention was expressed, to prove a like intention in a case which supposed the absence of intention.

It was decided, also, in *Jessop v. Watson* (1 My. & Kee. 667), upon the authority of the principal case, that the blending of the proceeds of real with personal estate for an express purpose which fails, will not operate so as to convert the real into personal estate for a purpose not expressed, viz., so as to give it to the next of kin. The case of *Ogle v. Cooke*, cited in the principal case, was for a long time considered an exception from the general rule; but in *Collins v. Wakeman*, 2 Ves. jun. 686, Lord Loughborough observes, that he had caused the Reg. Lib. to be searched, and it was found that the point had been left undecided. *Ogle v. Cooke*, therefore, is no authority whatever on this subject.

Upon the same principle, even an express direction that the proceeds of the sale of real estate shall be deemed personalty will not prevent the operation of the rule in favour of the heir-at-law: for however absolute such direction for conversion may be, it will be construed to extend to the purposes of the will only. See *Collins v. Wakeman*, 2 Ves. Jun. 683; *Countess of Bristol v. Hungerford*, 2 Vern. 645. See, however, the report of that case, Prec. Ch. 81, and the note to *Rogers v. Rogers*, 3 P. Wms. 193, where it is stated, that the Court held, that the ex-

[*889] ecutors were trustees for the next of kin of the testator, but *they happened also to be his co-heirs. This case, therefore, can be considered as of no authority either way. *Phillips v. Phillips*, 1 My. & Kee. 649, is, indeed, a decision against the claims of the heir; but it must be considered as overruled by subsequent cases. See *Williams v. Williams*, Rolls, 13th Dec. 1835, L. J., Part V., N. S., 84; *Roberts v. Walker*, 1 Russ. & My. 752; *Henchman v. The Attorney General*, 3 My. & Kee. 485; *Amphlett v. Parke*, 2 Russ. & My. 221; *Johnson v. Woods*, 2 Beav. 409; *Shallcross v. Wright*, 12 Beav. 505; *Gordon v. Atkinson*, 1 De Gex & S. 478; *Taylor v. Taylor*, 3 De G. M. & G. 190; *Robinson v. Governors of the London Hospital*, 10 Hare, 19; *Ellis v. Bartrum*, 25 Beav. 110; *Barrs v. Fewkes*, 13 W. R. (V. C. W.) 987; *Bedford v. Bedford*, 35 Beav. 584.

And although a direction that the proceeds of real estate shall be deemed personalty be followed by an express declaration that it shall not lapse for the benefit of the heir-at-law, he will not be excluded from what the law in the absence of such declaration would give to him. Thus, in *Fitch v. Weber*, (6 Hare, 145), a testatrix devised and bequeathed her real and personal estate, in trust as to the real estate for sale as soon after her decease as conveniently could be, and declared that the trustees should stand possessed of the proceeds of the sale, *as a fund of personal and not real estate; for which purpose she declared such proceeds or any part thereof, should not in any event lapse or result for the benefit of her heir-at-law*: and, after giving legacies, the testatrix directed her trustees to pay and apply the residue of her estate and effects as she should by any codicil to that her will, direct or appoint. The testatrix made no codicil. Sir James Wigram, V. C., after an elaborate examination of the authorities, held, that the heir-at-law was entitled to the proceeds of the real estate undisposed of by the will. "I feel myself called upon," observed his Honor, "to follow the course of decisions, in holding that the testatrix has expressed an intention to exclude the heir *only for the purposes of her will*, and that, if her words express more, and she has failed to say who shall take the surplus, the law must dispose of it." And see *Flint v. Warren*, 14 Sim. 554, 16 Sim. 124; *Bromley v. Wright*, 7 Hare, 334, 344; *Johnson v. Johnson*, 4 Beav. 318.

Mr. Cox, in a note to *Cruse v. Barley*, 3 P. Wms. 22, which has been highly commended by many eminent equity judges, states his opinion, that the several cases on this subject seemed to depend upon this question—*whether the testator meant to give to the produce of the real estate the quality of personalty to all intents, or only so far as respected the* [*890] *particular purposes of *the will*: for that unless the testator has sufficiently declared his intention, not only that the realty shall be converted into personalty *for the purposes of the will*, but further, that the produce of the real estate shall be taken as personalty,

whether such purposes take effect or not, so much of the real estate, or the produce thereof, as is not effectually disposed of by the will at the time of the testator's death (whether from the silence or inefficacy of the will itself, or from subsequent lapse), will result to the heir. In the opinion of a learned writer, which seems to be fully warranted by the authorities, this statement of the doctrine, although correct as far as it goes, is not sufficiently explicit, and requires the following explanatory addition: "But that every conversion, however absolute in its terms, will be deemed to be a conversion for the purposes of the will only, unless the testator distinctly indicates an intention that it is, on the failure of those purposes, to prevail as between the persons on whom the law casts the real and personal property of an intestate, namely, the heir and next of kin:" 1 Jarman on Wills, 530, 2nd ed.

Whether real property directed to be sold results to the heir as real or personal estate.—This question sometimes arises between the real and personal representatives of the heir. The following rules for deciding this question, where conversion is directed by will, may be laid down as the general result of the cases.

First, where it is necessary to sell the land for the purposes of the trust, and there is only a partial disposition of the produce of the sale, there the surplus belongs to the heir as money, and not as land, and will, therefore, go to his personal representative, even though the land may not have been sold during his lifetime; and, previous to the late Wills Act coming into operation, it would have passed by an unattested will as personalty. See *Wright v. Wright*, 16 Ves. 188; *Smith v. Claxton*, 4 Madd. 484; *Dixon v. Dawson*, 2 S. & S. 327; *Jessop v. Watson*, 1 My. & K. 665; *Hatfield v. Pryme*, 2 Coll. 204; *Wilson v. Coles*, 28 Beav. 215; *Wall v. Colshead*, 2 De G. & Jo. 683.

Secondly, where a sale is unnecessary, by reason of a total failure of the purposes for which the conversion was directed, the heir will take the estate as realty, descendible to his heir, and devisable only by a will, attested so as to pass real estate: *Chitty v. Parker*, 2 Ves. jun. 271.

A sale unnecessarily made by trustees will not vary the rights of the parties, as the proceeds will in that case be considered as the real estate of the heir: *Davenport v. Coltman*, 12 Sim. 610; and see *Cooke v. Dealey*, 22 Beav. 196.

This doctrine has been very *clearly illustrated by Sir John Leach, M. R., in *Smith v. Claxton*, 4 Madd. 492. "Where a [*891] devisor," observes his Honor, "directs his lands to be sold, and the produce divided between A. and B., the obvious purpose of the testator, is, that there shall be a sale, for the convenience of division; and A. and B. take their several interests as money, and not land. So, if A. dies in the lifetime of the devisor, and the heir stands in his place, the purpose of the devisor, that there shall be a sale for the convenience of division, still applies to the case; and the heir will take the share of

A. as A. would have taken it—as money, and not land. But in the case put, let it be supposed that A. and B. both died in the lifetime of the devisor, and the whole interest in the land descends to the heir; the question would then be, whether the devisor can be considered as having expressed any purpose of sale applicable to that event, so as to give the interest of the heir the quality of money. The obvious purpose of the devisor being, that there should be a sale for the convenience of division between his devisees, that purpose could have no application to a case in which the devisees wholly failed; and the heir would, therefore, take the whole interest as land.” See also *Bagster v. Fackerell*, 26 Beav. 469; *Wall v. Colshead*, 2 De G. & Jo. 683.

There is a material distinction as to the application of the doctrine of resulting trusts between those cases where conversion, which wholly or partially fails when it is directed by a will, and when it is directed by a deed. In the case of conversion of land directed by will, it has been already shown that the *devisor's heir* takes what is undisposed of according to the circumstances of the case, either as a realty or personalty.

Where conversion, however, is directed by a deed, there, as the deed operates not as a will from the time of the devisor's death, but from the time of the delivery of the deed, whatever is undisposed of results to the settlor and not to his heir; whether it results as personal estate, or as realty, depends upon the circumstance whether the objects for which conversion was directed wholly or partially failed.

Where there is a trust by deed for the conversion of real into personal estate for certain specified purposes, *some only of which fail*, there, whether the trust for sale is to arise in the lifetime of the settlor or not until after his decease, the property is impressed immediately upon the execution of the deed with the character of personalty, and so much as is undisposed of results to the grantor as personalty. Thus, in *Hewitt v. Wright*, 1 Bro. C. C. 86, real estate was limited to the use of the settlor for life, with remainder to trustees, in trust to sell and pay [*892] debts and a sum of *2100*l.*, and after payment of their expenses to raise to 1500*l.*, and pay the interest to Dorothy Wright, the daughter of the settlor, till she married, and to pay the principal to Dorothy within twelve months after her marriage; and there was a power of revocation. The settlor died without having exercised that power. Then Dorothy died, without ever having been married, and the trust as to the principal sum of 1500*l.* never having taken effect, the question was whether that sum was personal estate and passed by his will. Lord Thurlow held that it did. “If,” he says, “it goes in the case of a will to the heir in the case of a deed it must result to the grantor; and though in the case of the will it cannot go to the executor as money, not having been converted, but must descend to the heir, yet he should think that it was personal estate of the heir, and if he

were dead would go to his executor; and, if so, where it resulted to the grantor it would be personalty in his hands, and would pass as such. . . . He could not help thinking, notwithstanding *Emblyn v. Freeman*, (Prec. Ch. 541), that the trust of the 1500*l.* resulted here in the same manner, that it vested in Wright, the grantor, as personal estate, and so was disposed of by his will." See also *Van v. Barnett*, 19 Ves. 102; *Biggs v. Andrews*, 5 Sim. 424; *Griffith v. Ricketts*, 7 Hare, 299, 311; *Clarke v. Franklin*, 4 K. & J. 257, overruling *Emblyn v. Freeman*, Prec. Ch. 541.

Where, however, the whole purposes for which conversion of real property is directed fail from the moment of the delivery of the deed, such property results to the settlor as real estate: *Ripley v. Waterworth*, 7 Ves. 435. And see the remarks of Wood, V. C., in *Clarke v. Franklin*, 4 K. & J. 265.

Money directed to be laid out in land.—The principle upon which *Ackroyd v. Smithson* was decided, applies also to the converse case of money directed to be laid out in the purchase of real estate, devised to uses which partially fail, as well as those which wholly fail to take effect; for the undisposed of interest in the money or the estate, if purchased with the money, will result for the benefit of the next of kin of the testator, as personalty (*Head v. Godlee*; *Reynolds v. Godlee*, Johns. 536, 582), and will not go to the heir-at-law. The case of *Fletcher v. Chapman*, 3 Bro. P. C. Toml. ed. 1, and a dictum of Lord Redesdale's in *Tregonwell v. Sydenham*, 3 Dow, 207, seemed to lay down a contrary doctrine. But Lord Cottenham, while Master of the Rolls, in the leading case of *Cogan v. Stevens*, 1 Beav. 482, n., reported more fully in the Appendix to Lewin on Trustees, p. 911, 3rd ed., *after [*893] examining all the authorities upon this subject, which are somewhat conflicting, put an end to the anomaly which previously was supposed to exist in the law of conversion by deciding in favour of the claims of the next of kin. In *Cogan v. Stevens*, the testator ordered that 30,000*l.* should be laid out immediately by his executors in the purchase of an estate or estates in the county of Devon or Cornwall, the income of which should belong to his widow during her life, and after her decease to certain persons (all of whom died during the life of his widow, without issue), in tail, with remainder to a charity. The money was not paid out, and the gift to the charity being void under the Statute of Mortmain, it was held by Lord Cottenham, that the next of kin, and not the heir-at-law of the testator was entitled to the fund. "The question," said his Lordship, "is simply, whether, when a testator directs money to be invested in land for certain purposes, some of which are lawful and take effect, but others fail and become void, the property so given, after satisfying the lawful purposes, belongs to the next of kin, or to the heir of the testator. . . . Upon principle, and upon analogy to several well-established rules in equity,

it would appear that there is no doubt as to the proper solution of this question. The only difficulty arises from some few cases, or dicta of the judges, which it is impossible to reconcile with these principles or these rules; and some of the cases proceed from authority so high, that, if not absolutely binding on the Court, they ought at least to make it extremely cautious in pronouncing any judgment inconsistent with them. If a testator devises land for purposes altogether illegal, or which altogether fail, the heir-at-law takes it as undisposed of. If a testator gives personal property for purposes altogether illegal, or which altogether fail, the next of kin takes it, as in the case of an intestacy, as undisposed of. If a testator devises lands for purposes which are in part illegal, or which partially fail, or which require part only of the lands devised, the heir takes so much of the land as is undisposed of, and which was destined for the purpose which by law cannot, or in fact does not take effect, and so much as is not required for the purposes of the will; and this whether the land be actually sold or not. But here, it is said, the analogy between the cases of land and money ceases, and that, if a testator directs money to be laid out in the purchase of land for purposes which are partly illegal, or which partially fail, the next of kin has no such interest in the money as cannot be applied to the purposes of the will; but, if there are purposes legal and feasible which require the investment, the next of kin are excluded.

And why are they to be so excluded? *The proposition assumes [*894] the property in question, that is, a portion of the interest in the property, is not disposed of by the will, and the law gives to the next of kin all the personalty not disposed of. Is it from any incapacity in the next of kin to take property which exists in the form of land? That cannot be . . . An observation was made by Mr. Pemberton, at the hearing, which removes much of the difficulty which would otherwise have arisen from the cases, namely, that no authority of an earlier date than *Ackroyd v. Smithson* ought to have much weight with me. The force of this observation will be felt on adverting to what Lord Thurlow says in deciding that case. He says, 'I used to think, when it was necessary for any purpose of the testator's disposition to convert the land into money, that the undisposed land would be personalty.' Now this is precisely the argument used as to the conversion of money into land by Mr. Hodgson; and here I cannot but observe, that this subject of conversion has given rise to two of the ablest arguments ever addressed to any Court—that by Lord Eldon, on the one side, in *Ackroyd v. Smithson*, and that by Mr. Hodgson on the other, in the present case—an argument which has, since it has been delivered, been frequently mentioned at the bar in terms of the highest praise, and in which I gladly avail myself of this opportunity to express my entire concurrence. In that argument it was necessarily admitted, if all the purposes of a devise [qu. bequests of money to be

converted into land] failed, the whole belongs to the heir-at-law [qu. next of kin]. But it was contended, that if the purposes are to be in part executed, and so that the right to have such an investment of money in land effectually existed in any one, to answer such partial purpose, that the land so purchased, after answering such partial purpose, belongs to the heir. So thought Lord Thurlow, as to lands directed to be sold, before the argument in *Ackroyd v. Smithson*. No wonder, then, that there should be found, before that time, traces of authority in favour of the heir's claim to money, as there was of the next of kin's claim to land; but the exclusion of the latter is now too well settled to be disputed, and the argument for the heir rests on a supposed difference between the two. But no such difference was supposed to exist before *Ackroyd v. Smithson*: why then should it exist now? If there be any substantial difference in principle, let it prevail, but if in principle there be no distinction, is not the decision of *Ackroyd v. Smithson*, and the subsequent cases, of higher authority than any decision which may have taken place before the principle was so thoroughly discussed and established as it was in that case? In deciding in favour of the next of kin, I am *following the principle of *Ackroyd v. Smithson*, and maintaining that uniformity [*895] of decision as to the conversion of land into money, and of money into land, which was supposed to exist before that time The result of the whole authorities seems to be, that, before *Ackroyd v. Smithson*, no distinction was recognized between the doctrine as applicable to a conversion of money into land, or land into money: that, as to both, an opinion prevailed, that when a conversion was necessary, and part of the object failed, the unappropriated proceeds belonged to that representative on whom the law cast that description of property in which such proceeds were found to exist. This, as to land converted into money, was corrected in *Ackroyd v. Smithson*; but no case has occurred in which the point has been argued and determined as to money converted into land. I say argued and determined, because, if determined in *Leslie v. The Duke of Devonshire*, 2 Bro. C. C. 187, and *Fletcher v. Chapman*, 3 Bro. P. C. Toml. ed. 1, it certainly was not argued; but there are undoubtedly dicta of very eminent judges, since that time, which seem to shew an impression on their mind, that the principle of *Ackroyd v. Smithson* was not to be applied to a conversion of money into land. Those learned judges had not the benefit, which I have had, of hearing the point fully and most ably argued; and having, after the fullest consideration, come to the conclusion that that principle does not apply to the present case; and, as I am not bound by any of the authorities to maintain a distinction which was not originally supposed to exist, and which cannot be maintained in reason, and which, therefore, if maintained, would be a reproach to the law as it stands, I feel myself fully justified in preserving the uniformity of the rule, as

applicable to the two cases, by deciding against the claim of the plaintiff; and I may be allowed to express some satisfaction in finding I am not compelled by authority to hold that any heir should take, as such, what had no inheritable quality, but was pure personal estate, at the time of the ancestor's death, or that, as devisee, he should take that which was never destined for him, but was in most unquestionable terms given to another."

The principles laid down in *Cogan v. Stevens*, have been acted upon by Lord Langdale, M. R., in the case of *Hereford v. Ravenhill*, 1 Beav. 481. There a testator gave his ready money, and money which should be due and owing to him, save as therein mentioned, to trustees, in trust, "as soon after his decease as a convenient purchase could be found," to invest it in the purchase of real estate, and to settle the same to the use of his wife for life, and after her decease to the use of [*896] certain persons (who died during his life), in *fee, and, in the meantime, to lay the same out in the funds, and pay the dividends to the person to whom the rents of the premises to be purchased would for the time being belong; and the testator gave and bequeathed the residue of his goods, chattels, and personal estate to his wife absolutely. The widow having died, and the ultimate limitations to the remaindermen having failed by their deaths in the testator's lifetime, the question was, to whom the fund which then remained uninvested belonged. An objection was taken by the trustees, that the heir-at-law of the testator, who might be entitled to the fund, as impressed with the nature of realty, was not before the Court. Lord Langdale, M. R., upon the authority of *Cogan v. Stevens*, was of opinion that the heir-at-law was not a necessary party; because that case decided, that where a testator directed his personal estate to be converted into real estate for several purposes, some of which failed, his heir was not, after satisfying the purposes which could take effect, entitled to the personalty as being impressed with the character of real estate.

Distinction between a charge upon, and an exemption from, a devise.—It may not, perhaps, be out of place here, to notice the distinction that has been taken between the cases where property is devised, charged with the payment of a sum of money, and those cases where there is an exception from the devise. If the original destination of such sums has failed, by lapse or otherwise, the question then arises whether such sums result to the heir-at-law of the testator, or sink into the land for the benefit of the devisee.

It has been laid down by Sir John Leach, M. R., that "If a devise to a particular person or for a particular purpose, be intended by the testator to be an *exception* from the gift to the residuary devisee, the heir takes the benefit of the failure; but if it be intended to be a *charge* only upon the estate devised, and not an *exception* from the gift,

the devisee will be entitled to the benefit of the failure:" *Cooke v. The Stationers' Company*, 3 My. & K. 264.

Thus, where land is devised *charged* with a sum of money which is given upon a contingency which does not happen, the heir will not be entitled to such sum by way of resulting trust, but it will sink into the land for the benefit of the devisee. For instance, where land is devised to A. charged with a legacy to B., provided B. attain the age of twenty-one, Lord Eldon, C., has observed, "There the devise is absolute as to A. unless B. attains the age of twenty-one; if he does, then he is to have the legacy; but his attaining twenty-one is a condition upon which alone he is to have it. And if he does not attain that age, then the will is to *be read as if no such legacy had been given, and the heir-at-law does not come in, because the whole is absolutely given to the devisee:" *Tregonwell v. Sydenham*, 3 Dow, 210; but see and consider *Attorney-General v. Milner*, 3 Atk. 112; *Croft v. Snee*, 4 Ves. 60. So in *Cooke v. The Stationers' Company*, 3 My. & K. 266, the testator gave and devised to his executors all his freehold and leasehold estates in trust, that by sale of his personal property, and of so much of his real estates as might be necessary, they should raise a sufficient sum to purchase 10,700*l.* in the 3*l.* per cent. Consols, and he directed this sum of stock to be apportioned between certain legatees, and, among other objects of his bounty, to charities, and he then gave to his wife the rest and residue of his estate and effects of whatever kind, on condition that all the legacies were paid. The charitable legacies failing so far as they effected the real estate, it was held by Sir John Leach, M. R., that as the charitable legacies were to be considered not as an exception from the gift to testator's wife, but as a charge upon that gift, the wife was entitled to the benefit of the failure of the charitable legacies.

In *Re Cooper's Trusts*, 4 De G. Mac. & G. 757, a freehold estate was devised to trustees and their heirs, upon trust within one year after the testator's decease, "to raise by sale or otherwise," the sum of 2000*l.* and to permit his son to enjoy the estate "after raising as aforesaid" for his life, with remainders over. Half of the 2000*l.* was given for the benefit of a daughter of the testator for life, and after her death to her children. The daughter died without having had any children. It was held by the Lords Justices of the Court of Appeal, *dubitante* Turner, L. J., affirming the decision of Sir W. Page Wood, V. C., (23 L. J. (Ch.) 29, n.; 1 W. R. 231), that the 2000*l.* was a charge upon the devised estate, and not an exception out of the devise, and therefore, as to the 1000*l.* given to the daughter and her children, upon her death sunk for the benefit of the devisee. "The law," said Lord Justice Knight Bruce, "is settled agreeably to reason and good sense, that where landed property is given by will to one set of persons, or according to one set of limitations, but is subjected by the will to a pecuniary

charge in favour of other interests, and those other interests, given by the will, do not exhaust the entire property in the money, the charge, so far as it is not given away, sinks for the benefit of those to whom the real estate is devised, subject to the charge. That, I apprehend, no one will dispute. But it has been said that this is not such a case, because, in the first place, the real estate in question *is given [*898] to trustees, in trust within a twelvemonth to raise, by sale or otherwise, 2000*l.* A charge not directed to be paid out of income cannot well be raised but 'by sale or otherwise,' and these words mean no more than the law would attribute to a direction to raise the money by sale or mortgage, or to raise it simply. But reliance is placed upon the words 'after raising:' it was said that they mean something more than the expression 'subject to.' It is plain, however, in reason and principle as well as authority, that the expression means no more than a gift of the estate subject to the charge. The testator gives this real estate in effect, subject to a charge of 2000*l.*, half of which is given for a purpose that has exhausted that half, and the other half for the benefit of a lady for life, and afterwards of her children. That lady is dead, and has never had a child. It is therefore plain that the devisee of the estate subject to the charge is entitled to the benefit of the moiety of the 2000*l.*, the particular interest created by the will in that moiety having ended." See also *Jackson v. Hurlock*, Amb. 487; 2 Eden, 263; *Baker v. Hall*, 12 Ves. 497; *Ridgway v. Woodhouse*, 7 Beav. 437; *Noel v. Lord Henley*, 7 Price, 241; Dan. 211, 322; *Sutcliffe v. Cole*, 3 Drew. 135; *Tucker v. Kayess*, 4 K. & J. 339; *Heptinstall v. Gott*, 2 J. & H. 449.

Where a testator carves a chattel interest out of his real estate, and makes it the subject of limitations which fail, it will result to his heir, but with the character which the testator has impressed upon it, viz., that of personal estate. Thus, in *Burley v. Evelyn*, 16 Sim. 290, where a testator devised lands to trustees upon trust to sell, and retain 5000*l.* out of the proceeds of the sale, and to stand possessed of that sum in trust for A. for life, and after his decease upon certain limitations which were void for remoteness, and he gave his personal estate, after payment of certain legacies, and the *residue of the money to arise by the sale of his real estates*, after making good the legacy of 5000*l.* to B. A. died without having married, and the testator's heir also died. It was held by Sir L. Shadwell, V. C., that the personal representative of the heir was entitled to the 5000*l.*

Where a testator charges a sum of money upon a devised estate, and in consequence of the failure of the objects for which it was given the sum sinks for the benefit of the devisees, they will take it as real estate. Thus, in *Re Cooper's Trusts*, 4 De G. Mac. & G. 757, a testator devised a freehold estate, in such terms as made a sum of 2000*l.* a charge, as distinguished from an exception, upon the devise he afterwards made,

and he devised the estate to his son Philip for life,*with remainder in the events which happened to his sons Simeon and [*899] Thomas, as tenants in common in fee. The trusts declared of one half of the 2000*l.* were for a daughter of the testator for her life, and, after her death, for her children. Simeon and Thomas died in the life of Philip, who kept down the interest of the sum of 2000*l.* After the death of Philip the trustees raised to 2000*l.*, and subsequently the testator's daughter died without ever having had a child. It was held by the Court of Appeal in Chancery, affirming the decision of Sir W. Page Wood, V. C. (reported 23 L. J. N. S. (Ch.) 29, n. ; 1 W. R. 231), that the 1000*l.* formed part of the real estate of Simeon and Thomas at their decease. "This point," observed Lord Justice Knight Bruce, "was raised,—it was said that as this sum might have been, and, as it was contended, ought to have been raised, in the lifetime of the devisees, Simeon and Thomas, it is to have been taken as having been so raised, and is therefore personalty in the devisees. Now, perhaps, a sufficient answer is afforded to this suggestion by the circumstance that, in point of fact, no sale or conversion did take place till after the deaths of the devisees, Simeon and Thomas, as to whom alone it is material to consider the question. But, although it is probable that this part of the case might be so disposed of, I am inclined to put it on much more general ground. I am of opinion, making the supposition most beneficial to the appellants,—that is, supposing the money to have been raised by means of a sale during the lives of Philip and Simeon and Thomas,—that it was the right of any person interested in the estate (the title of the testator's daughter being removed out of the way), to have it re-invested in real estate, to give it the actual character as well as the assumed character of realty. Therefore, if the daughter had died, leaving Philip, leaving Simeon, and leaving Thomas surviving, it would have become the right of Philip to insist (if he had chosen) that this money should be invested in real estate, which character had only been taken from it at the outset for a purpose that had partially failed of effect or ended. In every possible view of the case, it appears that this must be treated as part of the devised real estate."

When a residuary devise or bequest comprehends property which would otherwise have resulted to the heir or next of kin.—In the cases we have before considered, the competition has been between the heir-at-law and the next of kin, where there has been a resulting trust for one of them ; but whatever may result to either the heir-at-law or next of kin, may, by appropriate words be given to *others: for instance, if in the principal case the testator had directed that if [*900] any of the legacies should fail, by reason of lapse or otherwise, the same should be paid to a particular person, it is clear that he would be entitled to such of the legacies as failed by lapse or otherwise. Difficulties however have often arisen in determining between the conflicting

claims of the heir-at-law and the residuary legatee or devisee, whether that which has wholly or partially failed to take effect in favour of those for whom it was originally destined, was intended by the testator to be comprised in such an event, in a residuary bequest or devise.

First, with regard to that class of cases in which the competition has been between the heir-at-law and the *residuary legatee*; viz., when the question arises whether the direction to convert realty into personalty is not so absolute as to pass the realty directed to be converted under a general residuary bequest of personalty. It seems, however, clear upon the principles laid down in the cases before examined, that a mere direction to sell land for a particular purpose is not considered such an indication of a testator's intention to convert real into personal property, to all intents, so that the undisposed of proceeds should pass under a residuary bequest of personalty. Thus, in *Maugham v. Mason*, 1 V. & B. 410, a testator devised freehold chambers to trustees and their heirs, upon trust to sell, and to apply the money arising by such sale towards payment of legacies, and the rents, until sold, to be applied to the same uses; and, after giving some pecuniary and specific legacies, as to the rest, residue, and remainder of his personal estate, after payment of his debts, legacies, and funeral expenses, he bequeathed the same to his trustees, their executors, administrators, and assigns, upon trust to convert all the said residue into ready money, and to lay out the same in the purchase of freehold property, to be settled as therein mentioned. The executors paid all the debts, funeral expenses, and legacies, out of the personal estate, not making sale of the real estate. Sir W. Grant, M. R., held, that the real estate, after payment of legacies, which were a primary charge upon the personalty, resulted to the heir-at-law, and did not pass under the residuary bequest. "The observation," said his Honor, "is perhaps minute, that the money, produced by the sale of the real estate, could not with propriety be spoken of as personal property to be converted into money; at most, however, this is a general bequest of the residue of his personal estate; and the question is, what was meant to be included under that description. Properly speaking, nothing is the personal estate of a testator that was not so at his death. He [*901] may certainly so express himself as to show that something else was intended; but where there is nothing but a direction to sell land, with application of the money to a particular purpose, and a subsequent bequest of the rest and residue of the personal estate, I know of no case in which it has been held that the surplus, after the particular purpose is answered, forms part of the personal estate, so as to pass by the residuary bequest. The mere disposition of the residue of personal estate can never solve the question, what is personal estate. The clause may be so conceived as to show the sense in which those words are used; but here is nothing more than those words, unaccompanied with

anything explanatory of the sense in which they were used." See, also, *Wilson v. Major*, 11 Ves. 205; *Berry v. Usher*, 11 Ves. 87; *Gibbs v. Rumsey*, 2 V. & B. 294; *Kellet v. Kellet*, 3 Dow. 248; *Dixon v. Dawson*, 2 S. & S. 327; *Collis v. Robins*, 1 De G. & Sm. 131.

Where, however, a testator expressly declares, that the money arising from the sale of real estate shall be considered as part of the personalty, it will pass under a general residuary bequest of personalty in the same will (*Kidney v. Coussmaker*, 1 Ves. jun. 436; *Collins v. Wakeman*, 2 Ves. jun. 683; *Robinson v. The Governors of the London Hospital*, 10 Hare, 19, 27), and it is liable to the trusts which attach to such residuary personal estate, and to the legal incidents affecting it: *Bright v. Larcher*, 3 De G. & Jo. 156; *Field v. Pickett*, 29 Beav. 568.

So also, the intention that the proceeds of the sale of real estate should pass under a residuary bequest of personal estate, may be inferred from expressions in the will irresistibly leading to such a conclusion; and the blending of the real with the personal estate has been considered as furnishing an indication of such intention: *Byam v. Munton*, 1 Russ. & My. 503; *Mallabar v. Mallabar*, Cas. temp. Talb. 78; *Kellet v. Kellet*, 3 Dow. 248; *Brown v. Bigg*, 7 Ves. 280; *Griffiths v. Pruett*, 11 Sim. 202; *Bromley v. Wright*, 7 Hare, 334.

The next class of cases to be examined is that in which the competition lies between the heir-at-law and the *residuary devisee*. And here it must be remembered, that although it has always been held that a will as to personalty speaks, at the *time of death of the testator*, and the residuary legatee therefore takes not only what is undisposed of by the expressions of the will, but that which becomes undisposed of at the death, by disappointment of the intentions of the will; yet previous to 1 Vict. c. 26, it was otherwise as to the residuary devisee of real estate, or of the price of real estate. As to him, the will spoke only at the *time of making it*, and he could take nothing but [*902] what was at that time intended for him.

Thus, in a case previous to the Wills Act, where a sum was expressly excepted out of the produce of real estate devised to be sold, and was not disposed of, it is clear that it belonged to the heir-at-law, and not to the residuary devisee: see *Collins v. Wakeman*, 2 Ves. jun. 683.

Upon the same principle, under the old law (although the authorities are somewhat conflicting), the better opinion seems to be, that where part of the produce arising from land devised to be sold, is directed to be applied to purposes which fail, either by lapse or on account of illegality, the heir-at-law, and not the residuary devisee of the produce, will be entitled to the benefit of the failure. Thus, in *Jones v. Mitchell*, 1 S. & S. 290, the testatrix by will gave 800*l.* out of the money to be produced by the sale of her real estates, to trustees, for the benefit of certain charitable institutions; and she gave the residue of the money to J. R. The gift of the 800*l.* being void, Sir J. Leach, V. C., held

that the heir of the testatrix, and not J. R., was entitled to it. "The devisor," said his Honor, "at the time of making the will, intended that the residuary devisee of the price of the land should take such residue, subject to the deduction of the 800*l.*, and not the 800*l.*, which is therefore undisposed of, and results to the heir." See, also, *Hutcheson v. Hammond*, 3 Bro. C. C. 128; *Collins v. Wakeman*, 2 Ves. jun. 683; *Gibbs v. Rumsey*, 2 V. & B. 294; sed vide contra, *Page v. Leipingwell*, 18 Ves. 463; *Noel v. Lord Henley*, 7 Price, 240; *S. C.*, 1 Dan. 211, 322.

The fact, however, of the testator having blended the produce of his real with his personal estate, has in many cases been considered a sufficient reason to exclude the heir, in favour of the residuary legatee, of the produce of the real and personal estate, by applying to the mixed fund the rule applicable to personalty, such rule being, even under the old law, as laid down by Sir John Leach in *Jones v. Mitchell*, 1 S. & S. 290, that the residuary legatee of personalty takes what is not effectually disposed of. See *Durour v. Molteux*, 1 Ves. 320; 1 S. & S. 292, n., the dictum of Lord Thurlow in *Hutcheson v. Hammond*, 3 Bro. C. C. 148; *Kennel v. Abbot*, 4 Ves. 802; *Amphlett v. Parke*, 1 Sim. 275; 4 Russ. 75, per Sir John Leach; *Green v. Jackson*, 5 Russ. 35; *S. C.*, 2 Russ. & My. 238; *Cooke v. The Stationers' Company*, 3 My. & K. 262.

The cases, however, of *Collins v. Wakeman*, 2 Ves. jun. 683; *Gibbs v. Rumsey*, 2 V. & B. 294, and *Amphlett v. Parke*, 2 Russ. & My. 221 (overruling the decision of Sir John Leach in that case), decide that, [*903] although real and personal estate are blended together, *a residuary devise or bequest of the proceeds to arise from the sale of the real and personal estate, will not carry to the residuary devisee or legatee of such proceeds, lapsed or void legacies, arising from the sale of the real estate, for such lapsed or void legacies, so far as they arise from the sale of the real estate, will result to the heir-at-law. In the case of *Amphlett v. Parke*, 2 Russ. & My. 221, a leading authority upon this subject, a testatrix gave her real estates upon trust to be sold, and directed the monies to arise from such sale, to be considered and taken as part of her personal estate; she then directed, that, out of the monies to arise from such sale, and out of all other her personal estate, certain pecuniary legacies should be paid; and bequeathed all the residue of her personal estate, and of the monies arising from the sale of her real estates, upon trust for two persons and their children. Some of the pecuniary legatees having died in the testatrix's lifetime, it was held by Lord Brougham (reversing the decision of Sir John Leach), that the conversion of the real estate into personal, directed by the will was not absolute, but partial only, for the purpose of making good the pecuniary legacies, and that such of those legacies as had lapsed, in so far as they were payable out of the produce of real estate,

had lapsed for the benefit of the heir-at-law. Lord Brougham, in his learned judgment in this case, thus ably sums up the doctrine applicable to this class of cases: "The rule," observes his Lordship, "which I have stated to be extracted from all the cases is, that you must clearly prove that the heir-at-law is excluded; that the words prevent the possibility of considering anything to be left as a resulting trust for him; and that the burthen of such proof lies upon those who claim in opposition to him. It is not at all inconsistent with that rule, but rather flows from it, and I agree in holding, that a testator may provide, not only that the undisposed residue, which is strictly personal, shall go to the residuary legatee, but that all lapsed legacies, of whatever nature, shall also go to him; and that, if it is clear, therefore, from express words, that he gave him the lapsed legacies that were to be raised by the sale of real property, and failed in consequence of lapse, mortmain, or any other cause;—if, he says, for instance, 'I give all the lapsed legacies as parcel of my residue, to the residuary legatee,' *cadit quæstio* there is no doubt he may; and if he can do it by express words, he can do it by plain and obvious intention to be gathered from the whole instrument. If you once arrive at the conclusion, that the testator has displaced the heir, then, of course, the lapse fund falls into the residue by express intention." See, also, *Salt v. Chattaway*, *3 Beav. 576; [*904] *Taylor v. Taylor*, 3 De G. Mac. & G. 190.

As to wills coming within the operation of the new Wills Act, 1 Vict. c. 26, it must be remembered that the 25th section enacts, "that unless a contrary intention shall appear by the will, such real estate or interest therein, as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail, or be void, by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will." See *Carter v. Haswell*, 3 Jur. N. S. 788.

The conversion of property, from one species to another, by the will of a testator, takes place, only for the purposes of the will; and so far as those purposes do not extend, or, in so far as any of them do not take effect in fact or in law, the property is considered as remaining in its former condition, as it was in the hands of the testator, and passes accordingly. See

Smith v. M'Crary, 3 Iredell's Equity, 204, 208; *The Commonwealth v. Martin's Executors and Devises*, 5 Munford, 117, 121; *Morrow v. Brenizer*, 2 Rawle, 185, 189; *Slocum v. Slocum*, 4 Edwards, Ch. 613.

Land directed to be converted into money.—If land is devised to trustees to sell for the payment of debts and legacies, the heir-at-

law has a resulting trust in such land, so far as it is of value, after the debts and legacies are paid, and he may come into equity and restrain the trustee from selling more than is necessary to pay the debts and legacies; or, he may offer to pay them himself; and pray to have a conveyance of the part of the land not sold in the former case, or the whole of it, in the latter, which property will, in either case, be land, and not money. "This right to call for a conveyance," says Washington, J., "is very correctly styled a privilege, and it is one which a court of equity will never refuse, unless there are strong reasons for refusing it. The whole of this doctrine proceeds upon a principle which is incontrovertible, that where the testator merely directs the real estate to be converted into money, for the purposes directed in his will, so much of the estate, or the money arising from it, as is not effectually disposed of by the will, (whether it arise from some omission or defect in the will itself, or from any subsequent accident, which prevents the devise from taking effect,) results to the heir-at-law, as the old use not disposed of;" *Craig v. Leslie*, 3 Wheaton, 564, 582; *Burr v. Sim*, 1 Wharton, 252, 262; *Pratt v. Taliaferro*, 3 Leigh, 419, 423.

"The general rule," said Harper, C., in *North et al., Ex'ors, v. Valk et ux.*, *Dudley's Equity*, 212, 216, "is well known, that land, directed by the testator to be sold, shall be regarded in equity as personal estate; but this is to be taken sub-

ject to various qualifications. If the land is directed to be sold, as the cases express it, out and out, as if there were a general arbitrary direction to sell, without any specification of the object of the sale, or of the purpose to which the money was to be applied, this would be evidence of the intention to convert the land into money, in all events; but if it be directed to be sold for certain specific purposes, and the purposes altogether fail, as if it be for the payment of debts, and the testator afterwards pays off his debts in his lifetime, there the lands will go to the heir as real estate. Or if after accomplishing the specified purposes, a surplus of the fund should remain undisposed of, a trust in this subject, it is said, results for the heir. The doctrine will be better understood by referring to the cases. These are referred to, and the doctrine explained by Mr. Cox, in his note to *Cruse v. Barley*, 3 P. Wms. 22. It was admitted in that case, that where an estate is devised to be sold to pay debts, if there be a surplus it shall go to the testator's heir-at-law; forasmuch as when the debts are paid, the trust is satisfied, and the motive of the testator for the sale of the estate is at an end; and the heir, if he pleases, on laying down the money for the debts, may take the estate himself. There is a class of cases to this effect, when land is devised to be sold for the payment of debts and legacies; if pecuniary legacies be given, and the *residue* disposed of, there, if some of the pecuniary legatees die in the testator's life-

time, so that their legacies lapse, these shall sink into the residuum in favor of the residuary legatees, and not go to the heir-at-law. The testator is supposed to have intended to convert the real estate into personal, in favor of the residuary legatees, and against the heir-at-law. . . .

" . . . Where the residue is disposed of, however, if one of several residuary legatees, who take as tenants in common, with no survivorship between them, dies in the lifetime of the testator, his lapsed share of the residue will go to the heir-at-law, so far as it is devised from the real estate. Such was the case of *Ackroyd v. Smithson*, (1 Bro. C. C. 503.) . . . The subject is fully examined in the argument of Mr. Scott, who seems to have changed the opinion of Lord Thurlow."

"In this case the real and personal estate is directed to be sold, for the specific purpose of paying debts and legacies, and there is no disposition of the residue. The personal estate is first applicable for this purpose. If it should prove sufficient it follows that V. (a niece, a naturalized citizen,) as against G., (another niece, an alien,) will be entitled to the real estate. If it should be necessary to sell the real estate, or any part thereof, she will be entitled to any surplus that may remain after paying debts and legacies."

"It is a clear rule in equity," said the court, in *Lindsay v. Pleasants*, 4 Iredell's Equity, 321, 323, "that, where real estate is directed to be converted into personal, for

an *express* purpose, which fails, to consider the disappointed interest as realty, (although the land has been sold,) and resulting to the heir. The rule equally applies to cases, where the real proceeds are blended and bequeathed with the personalty, (after answering particular objects;) and the context of the will affords no manifestation of the testator's intention to convert the real into personal estate, *out and out*." "Upon the principles of equitable conversion," said the chancellor, in *Wood v. Cone*, 7 Paige, 472, 476, "the proceeds of the real estate directed by the testator to be sold, is only considered as converted into personalty for the purposes of the will. And if any estate or interest in the converted fund was not legally and effectually disposed of by the will, there was a resulting trust, as to such estate or interest, in favor of the heir-at-law." See, also, *Wood v. Keys*, 8 Paige, 365, 369; *Arnold v. Gilbert*, 3 Sandford, 533, 556. And it may be regarded as well settled, that a direction to sell, for a particular object, or with a view to a contingent event, will not work a conversion, if the object cannot be accomplished, or the contingency does not happen, unless the testator plainly intended that the sale should be an end, and not merely a means; *Nagle's Appeal*, 1 Harris, 260-264. "A sale," said Bell, J., in delivering the opinion of the court in this case, "to effect some of a testator's objects, will not of necessity work a conversion of the whole subject of the sale, unless it be manifest such

was the design of the testator, irrespective of ulterior chances. The result of the authorities, as stated by Mr. Cox, in his note to *Cruse v. Barley*, 3 P. Wms. 22, is, that the question of conversion, out and out, depends on whether the testator meant to give to the produce of real estate, the quality of personality to all intents, or only so far as respected the particular purpose of the will; for, unless he has sufficiently declared his intention, not only that the realty shall be converted into personality, for the purposes of the will, but further, that the proceeds shall be taken as personality, whether such purpose take effect or not, the realty, or its produce may continue to be impressed with the character of land."

An instance, in which lands ordered to be sold, will be regarded as not converted, further than the range of the purpose for which the sale is ordered, extends, occurs, where a conversion of land into money is directed with a view to a division of the proceeds among certain objects of the testator's bounty, and a question arises of the liability of different parts of the estate to the debts of the testator. In reference to liability for the debts, the land is considered as being land unconverted; for the considerations which proceed from that point of view, intercept and cut off the purpose for which the conversion was ordered. In *Newby v. Skinner*, 1 Devereux & Battle's Equity, 488, lands were ordered to be sold and the proceeds divided among the testator's daughters, and specific legacies were given by

the testator to his widow and son.

A question of marshalling the assets arose between these parties; the latter contending that the proceeds of the sale of the lands ought to be regarded as in the nature of a pecuniary legacy, and therefore liable to abatement before the specific legacies, and the former insisting, that the said proceeds were in the nature of land specifically devised, and not liable for debts except upon a deficiency of the whole personal estate. "In our opinion," said Gaston, J., "the daughters have clearly the right in this controversy. The general rule is indisputable, that the personal estate is the first and natural fund for the payment of debts, and the real estate is not to be made liable thereto, except to supply the deficiency of the personal. It is sought, in this case, to subject the proceeds of the land devised to the daughters, because by the direction of the testator, to sell the land, he turned it, in the contemplation of a court of equity, into personality, and made it a part of his general personal estate. This position, to the extent to which it is pressed, is untenable. The real estate directed to be sold, was at the time of the testator's death, land. By the will it was to remain land until sold, and it was directed to be sold only for the convenience of division between the devisees. It was impressed with the character of personality so far as was necessary to effectuate the testator's purpose, but no further. Every person taking an interest under a will, in the produce of land directed



to be sold, is in truth a devisee, and not a legatee. As he takes from the bounty of the devisor, he must receive what is given, in the quality which the devisor has impressed upon it. The devisor has given, not the land, but the price of land; and though the trustee is not bound to sell, if the *cestui que trust* will take the land itself, yet the land in the hand of the *cestui que trust*, is, in equity, regarded as personalty; and if he die without any act to change its quality, it is personalty as between his heir and executor. The devisor might, if he pleased, (see *Kidney v. Cousmaker*, 1 Ves. Jr. 436, and 2 Id. 267,) have converted the land into money, out and out, and then from the whole context of the will, it would have been open for consideration, whether it was made an auxiliary fund for the payment of debts, or was thrown into the ordinary fund as a part thereof; or constituted the primary fund in exoneration of the personal estate. But even in these cases, the executors take as devisees; it is not strictly a part of the testator's personal estate, but real assets, applicable in their hands to the payment of debts, because devised to them in trust to be so applied. And in England, however it may be with us, the proceeds of land so converted, are held to be equitable, and not legal assets; *Barker v. May*, 9 B. & C. 489. But a conversion of land into money, directed for the benefit of devisees, creates no charge upon the land for the payment of debts, and does not make the proceeds either legal or

equitable assets, in the hands of an executor. He holds these proceeds simply as a trustee, for the devisees; *Gibbs v. Angier*, 12 Ves. 413; and see *Smith v. Claxton*, 4 Mad. 484."

[Where land which has been settled or devised is converted into money, under a power contained in the deed or will, or conferred by the law, the proceeds take the place of the land, and will go to the same persons, and in the same proportion, as if no such change had occurred; *Holland v. Cruft*, 3 Gray, 180. It is immaterial, said C. J. Shaw, "by what mode real estate is converted into personal, whether by a trustee with power to sell, and hold, and apply the proceeds, or by a devisee for life, with power to sell and take the income for his own life, by decree or license of any court of competent jurisdiction, or even when such conversion is constructively effected by articles stipulating to lay out money in land, and convert land into money to particular uses. Whatever be the mode, the fund takes the place of the land which yielded it, and is liable to stand in its place, and be applied and ultimately disposed of in the same manner, until the object is accomplished; *Fletcher v. Ashburner*, 1 Bro. C. C. 497. The general doctrine is stated and illustrated in many cases; *Lechman v. Earl of Carlisle*, 3 P. W. 211; *Elwin v. Elwin*, 8 Ves. 547; *Thornton v. Hawley*, 10 Ves. 129; *Wheldale v. Partridge*, 5 Ves. 388; *Craig v. Leslie*, 3 Wheat. 563; *Emerson v. Cutler*, 14 Pick. 120.

So, when land held in trust is taken for public use, under the right of eminent domain, the money paid for it stands in its place, subject to the same trust and to the same ultimate disposition; *Gibson v. Cook*, 1 Met. 75."]

Money directed to be laid out in land.—If money is ordered to be invested in lands to be settled in a particular manner, and the limitations directed, wholly or in part, cannot legally be executed, the fund continues to be personal estate of the testator, so far as the purposes of the conversion are not legal, and is to be distributed to the widow and next of kin as personalty; *Hawley v. James*, 5 Paige, 323, 486. "Although a court of equity," said the chancellor, in that case, p. 444, "considers money which the testator has directed to be invested in the purchase of land, and land which he has directed to be sold and turned into money, as of that species of property into which he has directed it to be converted, for all the valid purposes of the will, it is only considered in equity as if actually converted, so far as the objects for which the conversion was directed by the testator are legal, and can be carried into effect. But where the object of the conversion fails, either wholly or in part, whether such failure be occasioned by the incapacity of the devisee or legatee to take, or because of the illegality of the disposition attempted to be made of the converted property, or of any particular estate or interest in such property, or from any other cause, there will be a

resulting use, or trust, or estate in the property, or in so much thereof as is not legally or effectually disposed of, in favor of those who would have been entitled to such property if the conversion thereof had not been directed by the will."

In order that the conversion which a testator has directed should be sustained, it is not necessary that such conversion should have been intended to be made for all purposes whatever; if it is directed for any single purpose, and that purpose continues and operates, the conversion must take place. A sale of land ordered to be made for the convenience of dividing the proceeds among beneficiaries under the will, is an absolute conversion, so long as that object of division remains: see *Proctor v. Ferebee*, 1 Iredell's Equity, 143, 146; *Morrow v. Brenizer*, 2 Rawle, 185, 189. Nor will a conversion be arrested by the incapacity of some of the objects of the testator's bounty to take, after the conversion is made, provided the purposes for which the conversion was directed, subsists, as to some others of those objects. For example, if a sale of land be directed, for division of the fund among certain persons, and one of those persons dies in the testator's lifetime, so that his interest results to the heir-at-law, the sale must still take place, for the purpose of making the division, provided any of the distributees survive capable of taking, and the interest which results to the heir will be money and not

land: if all the distributees die in the lifetime of the testator, so that the purpose of the conversion, a division among them, wholly fails, the conversion will not take place, and the interest resulting to the heir will be land and not money. See *Marsh v. Wheeler*, 2 Edwards, 157, 160, and *Bogert v. Hertell*, 4 Hill, 493, 495, 500. "The authorities demonstrate," said Nelson, Ch. J., in the Court of Errors, in the latter case, under a will devising lands to be sold for convenience of division, "that where the deviser has directed or authorized the conversion of his real estate, even for a particular special purpose, such as distribution, courts are bound, so long as the purpose and object exist and continue, to regard it as of that species of property into which it was directed to be converted; and to the extent and for the purpose declared, it is to be treated as money and not land. This will be found to be the uniform language of all the cases on the subject. If the purpose and object of the conversion fail altogether, or in part, then the whole estate, in the one case, and the part, in the other, is regarded as an estate or interest undisposed of by the will; and as the deviser, in the event happening, has made no disposition of the estate, it takes the direction given to it by law independently of the will, and goes to the heir-at-law. But in the latter case, where there is only a partial failure, if the purposes of the will still require a sale and conversion, the heir takes the part thus undisposed of, as money, and not as

land, and, on his death, it will go to his personal representatives. . . . It may be considered as established beyond all controversy, that where the testator directs his lands to be sold for the purpose of division among his children and grandchildren, so long as this purpose of the sale and conversion exists and is necessary to carry out the intent of the will, so long the quality of personalty is effectually stamped upon the estate in the hands of the executors; and courts are bound to consider it as subject to the laws of that species of property into which it was intended to be converted."

There seems to be an anomaly, however, in considering that the heir-at-law can ever take a fund as money. The heir-at-law is entitled only to land: whatever he takes, is necessarily upon the ground of its being land; and it seems contradictory, that what he thus takes, should be taken as money. His title to have the fund rests upon its being land; in his ownership of it, after he has it, it is money. He claims it as one, and holds it as the other. Lord Eldon's amazing display of intellectual power in *Ackroyd v. Smithson*, was, to some extent, a triumph of argument over reason.

[The right of the heir results from the principle that the land being his, except in so far as the will discloses a different intention, he is *prima facie* entitled to so much of the proceeds as have not been disposed of or given away by the testator. But although the money goes, under these circum-

stances, to him who would have been entitled to the land, yet it goes to him as money, and will, consequently, be distributed as such among all who claim under him subsequently by descent or succession. Hence, while the surplus from a sale for the payment of debts results to the heir, it results to him as personalty, and will vest as such in his executors; *ante*, 821. The rule was so held in *Grider v. M'Clay*, 11 S. & R. 224; and *Pennell's Appeal*, 8 Harris, 515, with reference to the proceeds of a sale by authority of law; for the payment of debts, and the principle would seem to be the same when the conversion takes place under and in pursuance of the directions of the testator. "The general rule," said Lewis, J., in delivering the opinion of the court, "is that if land be sold for a specific purpose, the surplus money shall, as between the heirs and next of kin, be considered as land, so far as to vest in the persons who would have been entitled to it had it remained unconverted. But, after it has so vested in the person entitled, it is to be treated as money in his hands, and, in case of his subsequent death, goes to his personal representatives, as personal estate. It cannot retain its original character for ever. It has no earmark by which it can be distinguished from the other personal estate with which it is mingled. To identify and follow it throughout an indefinite number of successions would, in most cases, be absolutely impossible, and in all cases so inconvenient, as

to forbid the undertaking, unless required by the high necessities of justice. But the distribution of the estate of a decedent among persons who never gave value for it, and who have no title to it whatever, except that which is founded upon the law and its policy, involves no principle of justice, and stands entirely uninfluenced by its dictates. The necessity of a perfect conversion, at some period, being apparent, and neither justice nor policy requiring that a *fiction* should be substituted for the *fact*, the proper time for it is when the money has vested in the party entitled to it, after the actual conversion."

The fund arising from such a sale will, nevertheless, retain the character of real estate, "until it reaches one who, if it had remained real estate, would take it beneficially; that is, to his own use absolutely, or with a power, like that of tenant in tail in possession, to dispose of it absolutely, or make it his own to all purposes, and it will then be his absolutely; *Holland v. Adams*, 3 Gray, 188, 191.]

The doctrine of a resulting trust to the heir-at-law, upon the failure of the purpose for which a conversion is directed, proceeds upon the presumption that the testator intended a conversion for that purpose, only, and meant that in case of its failure, the property should pass as if no conversion had been directed. If therefore, the will discloses an intention that the property shall change its character, in all events, as well under the cir-

cumstances that arise upon the failure of some special purpose, as in the case of that purpose taking effect, there is no resulting trust to the heir; *Evans' Appeal*, 15 P. F. Smith, 183. Even in "cases of resulting trusts, for the benefit of the heir-at-law," says Washington, J., "it is settled that if the intent of the testator appears to have been to stamp upon the proceeds devised to be sold, the quality of personalty, not only to subserve the particular purposes of the will, but to all intents, the claim of the heir-at-law to a resulting trust is defeated, and the estate is considered to be personal;" *Craig v. Leslie*, 3 Wheaton, 564, 583; *Morrow v. Brenizer*, 2 Rawle, 185, 189; *Burr v. Sim*, 1 Wharton, 252, 263; *Arnold v. Gilbert*, 5 Barbour's S. Ct. 192, 195. "The criteria which the authorities upon the subject of conversion furnish, are these," said the Assistant-Vice

Chancellor, in *Wright and others v. Trustees of Meth. Episcopal Church*, Hoffman, 205, 219, "whether the will has prescribed a sale absolutely, and at all events—for all purposes, not merely for the purposes of the will—irrespective of all contingencies, and independent of all discretion. If the sale is to be made for a special purpose, or the general purposes of the will, and these purposes fail, conversion does not take effect; if it is to be made on a given event, it depends upon the occurrence of that event; if the disposition is left to the discretion of the grantee of the power, the will is not imperative, and does not convert the estate. . . . It is needless to advert to any other authority than that of *Ackroyd v. Smithson*, (1 Bro. C. C. 502.) Lord Eldon's celebrated argument in that case, has been the settled test of every decision since."

*WARD v. TURNER.

[*905]

JULY 20, 1752.

REPORTED 2 VES. 431.¹

DONATIO MORTIS CAUSA.—*Delivery necessary to donations mortis causâ; but the delivery of receipts for South-Sea Annuities is not sufficient, though strong evidence of the intent.*

THE end of the bill was to have a transfer of 600*l.* New South-Sea Annuities made to the plaintiff, as executor of John Mosely, and to have certain specific parts of the personal estate of William Fly, dead, intestate, delivered or made over to the plaintiff. Another prayer of the bill was to have an account of what was due to Mosely for services performed to Fly, against whose estate this demand was made.

¹ S. C., 1 Dick. 170.

The case the plaintiff made was this: he was executor of Mosely, who was related to Fly by affinity, having married his aunt; that Fly had great obligations to Mosely, who took care of him in his infancy; and at his house Fly used to come from school when it broke up: and afterwards, Mosely, who, in the latter part of his life, appeared to be in very mean circumstances, lived with Fly as his servant, until Fly's death, had his victuals there, performed services to him, and had now and then a shilling given him. From thence Fly, made profession of a strong intent to do for him at his death, and had great kindness for him; in pursuance of which, as Fly drew near his end, being in a very bad state of health, during that time he made Mosely several donations mortis causâ, in prospect of death. Four times were fixed on by the witnesses, of which several were examined in the cause, speaking of actual gifts, and declarations supporting [*906] *them. First, 18th January, 1746, which was spoken to by the porter of Furnival's Inn. The second 6th February, 1746, which was the principal proof relied on by the plaintiff to support the gifts of these annuities, and was proved by Fly's barber, who, being sent for by Fly, found Mosely with him, and no other, and swore to the particular words used, and declarations made: that Fly said to him, viz.: "I intended to give him (speaking of Mosely) Longford estate for his life: but I have considered of it; and that which is worth 40*l.* a year to another, is not worth so much to him; for if the tenants wanted an abatement for repairs, he would allow it; and, therefore, I will do better for him." That thereupon Fly went to his escritoire, and taking three papers, said, "I give you, Mosely, these papers, which are receipts for South-Sea Annuities, and will serve you after I am dead." The third, 23rd February, which was proved by one who swore that in his presence Fly, said, "Mosely, I give you all the goods and plate in this house." Fourthly, 3rd March, by the said barber, who swore that Fly declared to him, and to another person, who only were present, that he gave to Mosely all his household goods, money, arrears of rent, and everything that should be found in his house, except his sword, gun, and books, and that this, together with those three receipts, would make 2000*l.*: that he wished a gentleman of his acquaintance had his sword and gun, but all the rest he gave to Mosely. He died in April following.

These were argued to be so many declarations of bounty, supported by so many witnesses at different times. Two questions arose: first, Whether in fact, these things were given? secondly, Whether properly given in point of law? Donations mortis causâ are derived from the civil law. Justinian's Inst., lib. 2, tit. 7, shows the nature of them; and that, in general, anything is properly the subject matter of such donations, that may be the subject matter of a legacy or donation inter vivos. Either rights in

possession or reversion are capable of *being so given. It is not necessary that the donor should have a legal [*907] interest; an equity will do, when by no act he can pass the legal property: consequently, the formalities accompanying such donations must be according to the subject of the gift. Livery, then, cannot be always necessary, as, in a chose in action or simple contract debt, which lie not in livery, choses in action were not assignable, but now are in this Court as much as things in possession, by the rules of law; and, therefore, this Court will carry into execution a voluntary gift of a chose in action. In *Lawson v. Lawson*, 1 P. Wms. 441, such a gift of a note drawn on a goldsmith, which in point of law passed nothing, was held good: *Jones v. Selby*, Prec. Ch. 300; *Gold v. Rulland*, 1 Eq. Ca. Ab. 347. In *Snellgrove v. Baily*, March 11, 1744,¹ Mrs. Baily, going out of town in a bad state of health, gave her maid a bond, executed to her by a third person, saying, "If I die, it is yours." She died intestate; the plaintiff was her administrator; thus it stood in the defendant's answer. A bill being brought for discovery and delivery of the effects of the intestate in the hands of the defendant, the question was, whether the nature of the property was capable of being so given? His lordship held, it might, as well as a specific chattel; though no legal property passed thereby, nothing but the paper, a bond being evidence of a debt, and the intent being to give the debt, not the paper, the Court held it a good donation mortis causâ, comparing it to the property which passes by assignment of a bond, which passes nothing in point of law, and the assignee must make use of the other's name for recovery on it. That case rested singly on the averment in the answer; in this is strong evidence. The Court there put this case: that, if a chattel in possession had been bought by the intestate, and a bill of sale made to a trustee for her use, the property would have been in the trustee, and the equitable interest in the cestui que trust, who, if she had given this chattel so circumstanced to the defendant, it would have been good. [*Lord Chancellor* ²—That is a case put upon an equitable interest. There the chattel *itself must have been delivered.] Though these dona- [*908] tions differ in some respects from testamentary dispositions, yet they participate in a great degree; for like that, it is a declaration of his mind, what he will have done with his property when he is no more; he does not part with the property, or even the use of the thing, in his life; for that would prevent any such disposition from being ever made. Where the thing lies in livery, the livery is not made to complete, it is only evidence of the gift; and if, the moment after possession delivered (with a declaration that he intended, if he died, it should be the donee's, absolutely), the thing was restored by the donee, that would not tend to defeat the gift. [*Lord Chancellor*.—I apprehend it would: and that such an instantaneous gift and taking back would not do, which

¹ 3 Atk. 214; Ridg. Ca. t. Hard. 202.² Hardwicke.

it would be dangerous to admit.] But, where livery cannot be, the best evidence the nature of the transaction will admit of, being only to show the mind of the donor, will do. Here is such a delivery over, as is sufficient evidence of the gift of these annuities. They certainly lie not in livery, there being other ways of passing them. There is no evidence of them but one's name being placed in the book. The delivery, then, with strong words of gift of these receipts, which were the only symbol of his property, was as much as he could possibly do towards giving it, except a mere transfer in the books, which was not necessary, nor could he conveniently do that: and it was given with a prospect of not recovering of that particular illness, for that of itself would be a revocation; but he died of it, and within two months of the gift. In cases of livery of seisin it is not necessary to deliver the thing itself, or any part; for, coming upon the land, and delivering a gold ring thereon, is enough (1 Inst. 44), though not participating of land; but there ought to be clear proof of the intent, which there is here. Next as to the specific things, it is said, there was not sufficient possession delivered; but, in such a number of things, it is not necessary every one should be delivered. The subject of the gift is what was then in the house. If a [*909] *delivery is absolutely necessary, the plaintiff has not in deed proved it; but Mosely was actually in the house with him, and was then as much in possession as if actually delivered to him, which is not necessary if he is in possession. If one is recited to be in possession of a house, livery is not necessary. If one does as much as he can towards possession, it is all that is required; as delivery of the key of a warehouse; so of a piece of parchment, delivery of a ship and of the actual possession of it to the mortgagee, as determined by your Lordship in *Brown v. Williams* (1 Atk. 160). No more could be done here; for he could not carry the goods out of the house: and he was then in possession. However, as this is a bill for discovery of assets, if the plaintiff is not entitled to these gifts, he is at least to a reasonable satisfaction for his services.

On the part of the defendant, administrator of Fly, there was no evidence to impeach the evidence of the gift, but to invalidate it to a certain degree, principally from the behaviour of Mosely after the death of Fly, as not like one who thought he had a right to these donations from him; for it was sworn, that being at the house of Fly at his death, he continued there until Midsummer; he did not say these goods were his own, upon application made to buy them, but that they were Turner's, the administrator and next of kin; sent to Turner desiring him to take them away; that they were sent away, and Mosely assisted in packing them up, and declared he would not go into mourning, for that Fly had given him nothing that he could help. A donation mortis causâ (though there is, indeed, such a thing in the law) is of a very delicate nature, and, from its import, merely voluntary. [*Lord Chancellor*.—Such donations are subject to

debts.] If there is no distinction between testamentary dispositions and such a donation, and there is a former will, the Statute of Frauds will be overturned, which relates to all wills of personal estate; therefore, since the statute, no nuncupative will or codicil can be set up where a will was made before. This statute has expressed an anxiety *as to nuncupative wills, not taking [*910] them away absolutely for fear of breaking in upon the real intent, but, seeing them liable to uncertainty, litigation, and perjury, has put several restrictions on them; whereas, if the said distinction is not observed, a nuncupative will may take place, proved at any time, and that by a single witness, where more than one would not be ventured, for fear of contradiction, and that at any distance of time, nor confined to 30^l., as the statute required. A testamentary disposition is a gift in case of, and only has operation after, death. A donation, then, cannot be in general in case of death, but must have something peculiar, differing from legacies. The characteristic of it is this:—It is not on a general apprehension of approaching mortality, but where the particular recovery of the donor is annexed by way of defeasance to the gift, which would be otherwise absolute. It may be confined to an immediate illness; but the Roman law puts the case of a man's going a journey, which was formerly more hazardous than now; so, if going to battle, and in case he is killed, and makes that gift; so, if under a bad state of health, he makes a complete gift, if he does not recover; that must mean some circumscribed time or illness, and there must be some sort of defeasance, arising from the recovery or return home, to these donations, otherwise it is an absolute gift. But, though liable to be defeasanced, it must be a complete gift before inter vivos; and that is the reason the Ecclesiastical Court has no probate or jurisdiction over it, as it would if testamentary. Next, to consider what is meant by delivery, in the Roman and civil law books, as far as admitted in this country; for, as it is in all the books, it will not hold here. Where delivery is necessary to make that complete inter vivos, if a man said, "I give it," and there is no delivery, it would be nudum pactum: there could be no title or action. Then delivery is there put only to show that the gift must be complete. In that new species of property the actual delivery is supplied by that which is equivalent to delivery; as in case of a ship, delivered by bill of sale, which is defeasanced in case of *recovery; that is enough; but it must be complete [*911] according to the nature of the thing, otherwise it cannot be distinguished from a legacy. A delivery is necessary, according to Swinburne, in each of three instances he puts, of a donation mortis causâ. *Lawson v. Lawson*¹ turned upon it, and could not be admitted but on that foundation. There cannot, indeed, be such a donation by parol, of a book or simple contract debt, or of arrears of rent, because there can be no delivery,

¹ 1 P. Wms. 441.

and no inconvenience, because it may be easily done another way. Taking it in case of a specific thing, as a horse, &c., possession is altered (as Swinburne supposes), and then the donee shall enjoy it; otherwise there is no difference between this and a testamentary disposition. This donation, therefore, takes effect; but still liable to that contingency. There is no case that the donor must keep possession in his life; how, then, can he have the use or benefit of it, taking it to be a specific thing? As to a chose in action being allowed to be given, that was a new case before your Lordship; for *Snellgrove v. Baily*,¹ which was of a bond, was the first ever determined upon anything of a chose in action. The reason the Court went on there was, that it was as complete a gift as could be made of a bond; for, writing not being necessary to the assignment of a bond, if all was delivered that could be, all that was required was done. It was a substantial gift of the paper and seal, without which there could be no recovery on it. A bond carries the debt itself, not only evidence or security of it, therefore is considered as bona notabilia, and not only where the party dies, like other choses in action; and a court of equity does not say, a bond must be delivered by deed in writing. In *Richards v. Syme*,² on a gift of a mortgage to the mortgagor, by giving him the deeds, your Lordship held, that if that fact was proved, it was a gift of all the money on the securities, and not within the Statute of Frauds. So that the bond there is as completely given as can be, supposing that parol evidence is sufficient, and writing not necessary. If that was not the ground of that [*912] determination, *and no delivery requisite, but that it is to remain with the donor until his death, and only a formal delivery, it will not differ from the inconveniences intended to be guarded against by the Statute of Frauds; for then every loose declaration will be set up, notwithstanding solemn wills before executed. It is dangerous to support parol declarations upon gifts of this kind, not accompanied with a visible act to give notice to all the world, as delivery. And the statute has thought it better, that some of these true gifts should fail (as has frequently happened for want of the solemnities thereby required), than there should be a public inconvenience. If a common chose in action cannot be delivered, how can this, which is stronger, as it is capable of being assigned by a proper transfer? If, indeed, one goes as far as he can, the Court will perhaps supply it; as in those cases on the stat. Jac. 1, in *Ryall v. Rowles*,³ but that is not the case here. Fly was a man of business, an attorney, yet waits near two months without doing that which would effectuate it. That argument of the testator's having time to make a perfect gift, is often used in Doctors' Commons on imperfect wills. This Court will never support that as a donation, which may be a gift by will; for there must be a difference between them.

Lord Chancellor Hardwicke, in the outset, laid the other goods out of the case, of which there was no pretence of any delivery,

¹ 3 Atk. 214.² Barnard. Ch. Rep. 90.³ 1 Ves. 348.

which would be very dangerous; and that it was impossible to make such a complex donation mortis causâ, as a general bequest of all one's personal estate or of residue, without some proof of delivery; for that would be the same as a nuncupative will; and it was a pity the Statute of Frauds did not set aside all these kinds of gifts. But what weighed with him was, whether the stock without delivery was a good donation mortis causâ; which question, considering the vast proportion of property in such funds, was of infinitely greater consequence than the value of it; therefore he should not determine it hastily. If courts of justice were compellable by rules of law to suffer such gifts *without any transfer, to prevail, it could not be helped; but then [*913] the Statute of Frauds relative to nuncupative wills would be so far nugatory and vain.

Having taken time to consider, his Lordship now delivered his opinion.

LORD CHANCELLOR HARDWICKE.—There are two general questions. What is the weight and strength of the evidence in point of fact? Next, the result of that evidence in point of law, or the law arising on this fact?

As to the first, and as to the conviction arising therefrom, there is, to be sure, very strong evidence on the part of the plaintiff, of Fly's general intention of bounty, which is not to be disputed; but as to the evidence of the particular gifts, I cannot help taking notice, that the declarations relied on by the plaintiff to prove them, are all made to persons of extreme low degree, his porter, barber, &c. It is observable, also, that Fly was bred an attorney: had some property; some real estate; was a man of business; and must be presumed, from his profession and education, to know something of what the law required to make a will; and certainly it would be more easy for him to have made a will in writing, than to have taken all these several steps, to give away these parts of his estate. It is likewise observable, that the behaviour of Mosely, and his declarations after the death of Fly, are some impeachment and weakening of the plaintiff's evidence; for it is extraordinary, that, if he thought himself entitled, he should not insist upon these goods being his own, instead of suffering them to be taken away, and assisting therein. At the same time, if I was to ground my opinion upon any objection to the evidence in point of fact, I should not determine it, but send it to be tried; for this is as proper a case to be tried as any other.

It is not insisted upon by the plaintiff as a testamentary cause; for if he was to insist on that, it would overturn his demand, as he has no probate; but it is insisted on as a donation mortis causâ. Trover might be brought for it; *for it would transfer [*914] the property: but though I have searched for it, I do not find a case of that kind in the books, of such an action at law: but it might be tried at law, was there a foundation for it; and

if I was to ground my opinion upon the evidence in point of fact, I would direct a trial.

But, according to my opinion, there is no reason to give the parties that trouble: for next, supposing the fact well proved, the consideration is the result in point of law.

The relief sought, is founded upon these gifts being good donations mortis causâ.

First, as to any specific parts (if they may be so called), except the annuities. They are clearly not good, (as I declared at the hearing,) there being no pretence of any delivery in any shape whatever. They are so general, as, in my opinion, if they prove anything, to prove an intent to make a nuncupative will of all his personal estate, (this is exclusive of annuities,) saying, "Mosely, I give you all the plate and goods in this house," or, "If I die, all are yours;" but nothing was delivered. It is said, he had possession by living in the house, and did not want delivery, but he lived as a servant, who had no possession; so that, if a servant had them in custody, it would be a possession for his master. The other declarations are not only of the goods, but of all money and arrears of rent, and extend almost to everything; consequently, there are no grounds to carry it so far: and it is impossible to support any of these gifts in prospect of death, as I have declared already.

Next, as to the gift of this annuity. If the witnesses deserve credit, it is strong evidence of a general intent of bounty; but it rather turns against the plaintiff, for it shows a general intent to give the whole to Mosely, by making a nuncupative will or wills at different times. If that was to be admitted to support these several gifts as so many donations mortis causâ, it would overturn not only the letter but the whole spirit and intent of the Statute [*915] of Frauds. But, notwithstanding, suppose this *gift of the annuities was just, as if it was a distinct and independent donation from the other matters insisted on as gifts, the question is, whether it is such a gift as the law of England allows, as a donation mortis causâ? First, The fact of the gift is proved only by one witness: whereas the civil law, from which this doctrine is taken, requires five witnesses thereto; for Justinian, when he allowed these gifts, was apprehensive of fraud arising from them, and takes notice in that very chapter relied on for the plaintiff, that he had made a constitution to regulate it, that it should be in the presence of five, limited in point of value, &c., which shows how jealous he was of it. Besides, the witness swears to this in very formal words; and, though it is pretty hard to object to a witness as loose and uncertain on one hand, and the contrary on the other, yet this argues either a very strong memory or a pretty strong assurance in swearing. But the express gift, as he swears, is only of the three receipts. That is the form of the gift. Taking it, therefore, according to the substance of the gift, that this amounted to a declaration that Fly, by giving these receipts, intended to give the annuities, upon this the

principal point arises, whether delivery of the thing given by way of donation mortis causâ is necessary: and, if necessary, whether this delivery of the receipts is sufficient delivery of the thing given by way of donation mortis causâ? I am of opinion, that delivery is necessary to make good such a gift, and that the delivery of these receipts for the consideration-money of the purchase of them was no sufficient delivery to validate this act. To clear this, it is proper to consider the notion of a donation mortis causâ, according to the civil and Roman law, and the law of England.

According to the civil and Roman law there is a great variety, and several passages therein are pretty difficult to reconcile. Digest, lib. 39, tit. 6, Law 38, requires, that both donor and donee should be present at the time of the gift, "*quo præsens præsenti dat;*" which looks as if delivery was intended at the time. It is "*quo*" there, and in several editions: but in the Lyons edition of Gothofredus' **Corpus*, it is "*quod;*" which makes it sense. [*916] Next, in Digest, same tit. parag. 1, it speaks of it through-out as a restoring of the same thing, if the donor should recover: as if a restitution was to be. It is proper to take notice, that in the Roman law there were *three* kinds of donations mortis causâ. And in Voet on the Pandect, lib. 39, tit. 6, parag. 3, in his 2nd vol. p. 710, the division is agreeable to that made of these donations by Swinburne. The first is a donation by one in no present danger, but in consideration of mortality if he died; and this is strictly compared to a legacy; for the property was to pass at the death, not at the time. The second kind is, where the property passed at the time, defeasible in case of an escape from that danger in view, or of recovery from that illness. The third was, where, though he was moved with the danger, yet not thinking it so immediate as to vest the property immediately in the person, but put in possession of the person as an inchoate gift, to take effect in case he should die. Vinus's Comment. on this place of Justinian is more particular—puts the remedy by action the donor might have, in case he repented or revoked. That is, on the last kind of donation mortis causâ, where he did not part with the property immediately, he should have a real action; but where he actually parted with the property, but the gift was to be defeated by his revocation or recovery, or escape from that danger he was in, *conditionem habeat*, (which is a personal action,) to make the irritancy, or to recover damages for the thing: so that it differed not but in the nature of the action. And in Calvin's Lexicon, &c., that is the distinction. Swinburne, on the text I have quoted implies there should be a delivery; saying, that legacies differ from such donations, for, that legacies are not delivered by the testator, but to be paid or delivered by the administrator; putting the distinction upon the one being delivered in life, the other after death. But, notwithstanding this, several books in the civil law import the contrary; particularly Vinus, in his Comment., lib. 2, tit. 7, sec. 1, numero 2; Covarruvias, vol.

[*917] 1, rub. 8, and *Voet on the Pandect, same chapter, num. 3 and num. 6, which passages shew the different expression and opinions, some importing a delivery, others not. I have mentioned them to come at that which seems the distinction, reconciling them all, according to what is laid down by Voet, num. 6, that they did not require an absolute delivery of possession to the first or third kind of gift I have mentioned; but, in the other case, where the property was to pass immediately, it was required; which is the meaning of the expression in Voet, "in mortis causâ donatione dominium non transit sine traditione," and of that other expression in Voet. With this distinction, those passages in the civil law are properly reconciled.

Though I know these donations mortis causâ could never come directly in question in the Ecclesiastical Court, they might collaterally; and, on these two heads I inquired whether there have been any cases there upon this, viz., in suits against an administrator on account of assets by the next of kin, where the administrator had insisted he could not administer such a part, because it was given mortis causâ; or, if there is a will, in which there are specific legacies, and one of those legacies he had given in his life by way of donation mortis causâ, there it might come in question in the Ecclesiastical Court; but I cannot find it has. The nearest case to it is *Ousely v. Carrol*,¹ June, 1722, in the Prerogative Court, before Dr. Bettesworth. There was left a writing in the presence of three witnesses, not in the form of a will, but a deed, viz.: "I have given and granted, and give and grant, to my five sisters, and children of the sixth, their heirs, executors, and administrators, in case they survive me, all my goods and chattels, and real and personal estate, and all which I may claim in right of my own, whether alive or dead." The dispute was by a person claiming as his wife, and who had been so, but divorced, who insisted this was no will, but a deed of gift mortis causâ (and a gift mortis causâ may be made in writing as well as otherwise, [*918] and so it might by the *Roman and civil law); but the Ecclesiastical Judge was of an opinion this was testamentary, proved it as such, as a testamentary act, and probate was granted, from which there was no appeal; but a case was there cited of *Shargold v. Shargold*, upon a deed of gift by Dr. Pope, not to take place until his death, and sixpence delivered, by way of symbol, to put the grantee in possession: that was pronounced for as a will, not as a donation mortis causâ; which I mention to shew how far the Ecclesiastical Court has considered these things as testamentary.

Having considered these donations, the different species, and how far delivery is necessary by the Roman and civil law, I will consider it according to the law of England. They are undoubtedly taken from the civil law; but not to be allowed of here

¹ See *Thorold v. Thorold*, 1 Phillim. 1; *Attorney General v. Jones*, 3 Price, 868.

farther than the civil law on that head has been received and allowed. Taking the law of England to consist (as Hob. says) of rules of law and equity, it might have come in question in cases of action of trover and detinue; but I have never found any action on that head. Consider it, therefore, as in this Court, the civil law not binding here, but as far as received and allowed; which must be from adjudged cases and authorities, proving that the civil law has been received in England, in respect of such donations, only so far as attended with delivery, or what the civil law calls tradition, for which, Swinburne, who, being an English writer on the civil law, what he lays down is some evidence of what has been received here, Part 1, sec. 7; but, in other places, sec. 6, in tit. Definition of Legacy, he is still more express. In both places, in one directly, in the other collaterally, he lays down, that delivery is necessary.

Next, consider it on the resolutions of this Court; the same thing results from them. There are not many cases on this head, and they are somewhat loose. The first is *Drury v. Smith*, 1 P. Wms. 404, where Lord Cowper founded himself on this, and the possession transmitted and changed; next *Lawson v. Lawson*, 1 P. Wms. 441. All that I can collect from thence is, that the [gift of the] *purse was held good, because delivered to the wife herself. As to the other legacy of 100*l.* bill, I [*919] cannot say on what it depended. It is a kind of compound gift; so many collateral circumstances are taken into it, that nothing can be inferred from it; but, being a draught on his goldsmith, that draught was delivered; so that it does not contradict what I lay down; and there was delivery, so far as it was capable. In *Jones v. Selby*, Prec. Ch. 300, the result is, that the opinion of the Master of the Rolls was founded plainly on this, of the delivery of possession; holding, that the gift of the tally, as contained in the hair trunk, was a good donation mortis causâ; and that Lord Cowper avoided determining that, on the foundation of the subsequent point of a satisfaction or ademption, on which he grounded his determination. In all the instances, it is absolutely necessary to be the person's after the party's death; though, in some cases, it vest the property, in others not. But, to explain more fully Lord Cowper's opinion there, I will refer you back to *Drury v. Smith*, and to *Hedges v. Hedges*, Prec. Ch. 269, which turned on another point; but there Lord Cowper laid down a necessity of delivery very strongly; where he says, testator "gives with his own hands." *Snellgrove v. Baily*,¹ determined by me, 11th March, 1744, was urged, where a bond was given in prospect of death; the manner of gift was admitted; the bond was delivered; and I held it a good donation mortis causâ. It was argued, that there was no want of actual delivery there, or possession, the bond being but a chose in action; and, therefore, there was no delivery but of the paper. If I went too far in that case, it is not a reason

¹ 3 Atk. 214.

I should go further, and I choose to stop there. But I am of opinion that decree was right, and differs from this case; for, though it is true that a bond, which is specialty, is a chose in action, and its principal value consist in the thing *in action*, yet some property is conveyed by the delivery; for the property is vested, and to this degree, that the law books say, the person to whom this specialty is given, may cancel, burn, and destroy it; [*920] the consequence of which is, that it *puts it in his power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond without a profert in curiam.¹ Another thing made it amount to a delivery, that the law allows it a locality; and therefore, a bond is bona notabilia, so as to require a prerogative administration, where a bond is in one diocese and goods in another. Not that this is conclusive; this reasoning I have gone upon, is agreeable to Jenk. Cent. 109, case 9, relating to delivery to effectuate gifts. How Jenkins applied that rule of law he mentions there, I know not; but rather apprehend he applied it to a donation mortis causâ; for if to a donation inter vivos, I doubt he went too far.

Another case is *Miller v. Miller*, 3 P. Wms. 356; which is a very strong case, so far as that opinion goes, to require delivery; which case, I believe, was hinted at as inconsistent with my decree; but there is a great difference between delivery of a bond, (which is a specialty, is itself the foundation of the action, and the destruction of which destroys the demand,) and the delivery of a note payable to bearer, which is only evidence of the contract. Therefore, from the authority of Swinburne, and all these cases, the consequence is, that by the civil law, as received and allowed in England, and consequently by the law of England, *tradition or delivery is necessary to make a good donation mortis causâ*; which brings it to the question, whether delivery of the three receipts was a sufficient delivery of the thing given, to effectuate the gift. I am of opinion it was not.

It is argued, that though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of anything by way of symbol is sufficient; but I cannot agree to that; nor do I find any authority for that in the civil law, which required delivery to some gifts, or in the law of England, which required delivery throughout. Where the civil law requires it, they require actual tradition, delivery over of the thing. So in all the cases in this court, delivery of the thing given is relied on, and not in the name of the thing, as in the delivery of sixpence, in [*921] **Shargold v. Shargold*; if it was allowed any effect, that would have been a gift mortis causâ, not as a will, but that was allowed as testamentary, proved as a will, and stood. The only case wherein such a symbol seems to have been held good, is *Jones v. Selby*; but I am of opinion that amounted to

¹ An action may, however, now be brought without profert. See *Duffield v. Elwes*, 1 Bligh. N. S. 548.

the same thing as delivery of possession of the tally, provided it was in the trunk at the time. Therefore, it was rightly compared to the cases upon 21 Jac. 1, as *Ryall v. Rowles*,¹ and others. It never was imagined, on that statute, that delivery of a mere symbol in the name of the thing, would be sufficient to take it out of that statute; yet, notwithstanding delivery of the key of bulky goods, where wines, &c., are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing: and, therefore, the key is not a symbol, which would not do. If so, then, delivery of these receipts amounts to so much waste paper; for if one purchases stock or annuities, what avail are they after acceptance of the stock? It is true, they are of some avail as to the identity of the person coming to receive; but after that is over they are nothing but waste paper, and are seldom taken care of afterwards. Suppose Fly, instead of delivering over these receipts to Mosely, had delivered over the broker's note, whom he had employed, that had not been a good delivery of the possession. There is no colour for it; it is no evidence of the thing, or part of the title to it; for suppose it had been in a mortgage in question, and a separate receipt had been taken for the mortgage money, not on the back of the deed (which was a very common way formerly, and is frequently seen in the evidence of ancient titles), and the mortgagee had delivered over this separate receipt for the consideration money, that would not have been a good delivery of the possession, nor given the mortgage, *mortis causâ*, by force of that act.² Nor does it appear to me, by proof, that *possession of these three receipts continued with Mosely [*922] from the time they were given, in February, to the time of Fly's death; for there is a witness who speaks, that, in some short time before his death, Fly showed him these receipts, and said he intended them for his uncle Mosely. Therefore, I am of opinion, it would be most dangerous to allow this donation *mortis causâ*, from parol proof of delivery of such receipts, which are not regarded or taken care of after acceptance; and if these annuities are called choses in action, there is less reason to allow of it in this case than in any other chose in action, because stocks and annuities are capable of a transfer of the legal property by Act of Parliament, which might be done easily; and if the intestate had such an aversion to make a will as supposed, he might have transferred to Mosely; consequently, this is merely legatory, and amounts to a nuncupative will, and contrary to the Statute of Frauds, and will introduce a greater breach on that law than was ever yet made; for if you take away the necessity of delivery

¹ 1 Ves. 348.

² That reasoning is quite idle unless Lord Hardwicke meant to say that delivery of the deed with a receipt upon the back of it, not by force of the delivery of the receipt on the back of it, but by force of the delivery of the deed, would be a good *donatio mortis causâ*. Per Lord Eldon, in *Duffield v. Elwes*, 1 Bligh. N. S. 548.

of the thing given, it remains merely nuncupative. To this purpose, consider the clauses in the Statute of Frauds¹ relating to this; which seem to me to be applied directly to prevent a mischief of this sort. The clauses are in sections 19, 20, 21, 22,² which have very anxious provisions against dispositions of this kind, requiring three witnesses, solemn declaration of the testator, fixing the place of making, and to be reduced into writing in six days after making. These are in cases where no will was made. Next, comes another requisite, where a will has been made. It what the plaintiff insists on is right in point of law, that this gift of the annuities by delivery of the receipts was good, yet, though Fly had made a will before, it had been equally good, notwithstanding that will, because this relates to revocation of a will in writing by anything amounting to a testamentary act. It would be good against the will, as appears from the cases. Would not that be quite contrary to the plain provision of this clause, taking away delivery of the thing? Here is, then, [*923] a revocation of a will by words only; viz.: "This is yours when I die;" all these clauses, therefore, will be overturned, if such evidence is admitted. But it is said, if this is not allowed, it will be impossible to make a donation mortis causâ, of stock or annuities, because in their nature they are not capable of actual delivery. I am of opinion, it cannot, without a transfer, or something amounting to that: and there is no harm in it, considering how much of the personal estate of this kingdom, vastly the greatest proportion of it, subsists now in stock and funds; and all the anxious provisions of the Statute of Frauds will signify nothing, if a donation of stock, attended only by delivery of the paper, is allowed. It might be supported to the extent of any given value, and would leave these things under the greatest degree of uncertainty, and amount to a repeal of that useful law as to all this part of the property of the subjects of this kingdom. Therefore, notwithstanding the strong evidence of the intent, this gift of annuities is not sufficiently made within the rules of the authorities; and I am of opinion not to carry it further. If any doubt remains in any one's mind, I will add (what I very seldom do, though it has been done by my predecessors), that I should be very glad to have this point settled by the supreme authority; for it highly ought to be settled, if there is a doubt, considering so large a property of this kind.

The bill ought to be dismissed therefore, without costs, as to the demand of these annuities, or any other part of the intestate's estate by way of donation mortis causâ.

But as there was a plain intent of bounty and kindness to this

¹ 29 Car. 2, c. 3.

² These sections are repealed by 1 Vict. c. 26, s. 2; but as to the wills of soldiers on service, or mariners, and as to the wills of petty officers, seamen, non commissioned officers of marines, and marines, so far as relates to money arising from service, see ss. 11 & 12, & 11 Geo. 4 & 1 Will. 4 c. 20.

old man, who lived with him as a servant, and it seems, in expectation of what should be given at his death, therefore, on the other part of the bill an inquiry should be, what Mosely deserved over and above his maintenance, for services performed during the life of Fly. The account should be taken from a reasonable time, if the plaintiff thinks fit to pay it.

*In *Ward v. Turner*, which is a leading case on the doctrine [*924] of donations mortis causâ, Lord Hardwicke, with great learning, discusses the authorities upon the civil law, from which it has been imported into the law of England. See *Duffield v. Elwes*, 1 Bligh, N. S. 536; 1 Dow & C. 10.

In the subsequent case of *Tate v. Hilbert*, 2 Ves. jun. 111, *Ward v. Turner* was commented on, and the civil law more fully explained, by Lord Rosslyn, in his very able judgment. "All the passages in Swinburne," said his Lordship, "are only references to different texts of the civil law; and where he defines donatio mortis causâ he is coupling the description of a legacy with a very short text of the civil law; there is a perplexity in it. He takes it from a part of the civil law compiled at a time when the subject itself rested in a degree of contradiction, and it was the common topic of debate, whether gifts under such circumstances resembled a gift or a legacy The two first species of which he makes mention, are clearly mere donations. Swinburne has there taken an authority from the Digest, which he refers to, and has copied. It does state these donations, and rates them all under the general title, Donatio mortis causâ.

"That is the time when it was in dispute. 'Julianus, libro 17, Digestorum, tres esse species mortis causâ donationum ait; unam, cum quis nullo præsentis periculi metu conterritus; sed solâ cogitatione mortalitatis, donat. Aliam esse speciem mortis causâ donationum ait, cum quis imminente periculo commotus ita donat, ut statim fiat accipientis. Tertium genus esse donationis ait, si quis periculo motus non sic det, ut statim faciat accipientis, sed tunc demum, cum mors fuerit insecuta.'

"If he had looked a little further under the same title, he would have found there an opposite, but a much more correct opinion, which finally prevailed, and was established as legal. It is the twenty-seventh law: 'Ubi ita donatur mortis causa, ut nullo casu revocetur, "mors" (that must be supplied) causa donandi magis est, quam mortis causâ donatio: et ideo perinde haberi debet atque alia quævis inter vivos donatio; ideoque inter vivos et uxores non valet; et ideo nec Falcidia locum habet quasi in mortis causâ donatione.' In the institutions, in the time of Justinian, tit. 7, De Donationibus, there is a history given of these contests that had prevailed; and a definition is strictly given of what shall be donatio mortis causâ. 'Mortis causâ donatio est, quæ propter mortis

fit suspicionem, cum quis ita donat, ut si quid humanit  s ei contigisset, haberet is qui accepit, sin autem supervixisset, is, qui donavit, reciperet; vel si eum donationis p  nituisset, aut prior decesserit is, cui donatum [*925] sit. *H  c mortis caus   donationes ad exemplum legatorum redact  e sunt per omnia: nam cum prudentibus ambiguum fuerat utrum donationis an legati instar eam obtinere oporteret, et utriusque caus   qu  dam habebat insignia et alii ad aliud genus eam retrahebant; a nobis constitutum est; ut per omnia fere legatis connumeretur, et sic procedat quemadmodum nostra constitutio eam formavit. Et in summ   mortis caus   donatio est, cum magis se quis velit habere qu  m eum, cui donat, magisque eum cui donat, qu  m h  redem suum: Just. Inst., tit. 7, De Donatombus. There it is clearly and correctly defined, that it had in effect the nature of a legacy, and was liable to debts, and that it was only a gift upon survivorship; and the danger of suffering these gifts to be taken loosely occasioned, at the same time, with the passage I have read, an ordinance of the emperor, that it should be in writing, with five witnesses. In the case before Lord Hardwicke (*Ward v. Turner*), in which all the cases were very fully considered, he takes notice of this perplexity in the reasoning, before it was properly defined; but considers clearly, that by the law of England, it cannot be a present, absolute gift, but to take effect on the death of the party."—per Lord Rosslyn, in *Tate v. Hilbert*, 2 Ves. jun. 118; and see *Staniland v. Willott*, 3 Mac. & G. 674.

The following circumstances are requisite in order to constitute a good donatio mortis caus  :—

1. The gift must be made by the donor in contemplation of the conceived approach of death (*Duffield v. Elwes*, 1 Bligh, N. S. 530; *Edwards v. Jones*, 1 My. & Cr. 233, 236); otherwise it will not be a good donatio mortis caus   (*Hedges v. Hedges*, Prec. Ch. 269; *Walter v. Hodge*, 2 Swanst. 92, 100); but a gift will be presumed to be in contemplation of death, where the donor is "in his last sickness," or "languishing on his death-bed:" *Miller v. Miller*, 3 P. Wms. 356; *Lawson v. Lawson*, 1 P. Wms. 441; *Walter v. Hodge*, 2 Swanst. 100; but see the dictum of Chief Baron Eyre in *Blount v. Burrow*, 1 Ves. jun. 546.

2. The gift must be intended to take complete effect only after the donor's decease: *Edwards v. Jones*, 1 My. & Cr. 233; *Tate v. Hilbert*, 2 Ves. jun. 120. But it is not absolutely necessary that the donor should expressly declare that the gift is to be returned to him if he recover, for if it be made in the extremity of sickness, or in contemplation of death, the law implies a condition, that it is to be held only by the donee in the event of the donor's death. Thus, in *Gardner v. Parker*, 3 Madd. 184, A. being seriously ill, two days before his death, in the presence of a servant, gave B. a bond, saying at the same time, "There, take that, *and keep it." Sir John Leach, V. C., held the gift [*926] to be a donatio mortis caus  . "The doubt," said his Honor,

"here is, that the donor has not expressed that the bond was to be returned if he recovered. This bond was given in the extremity of sickness, and in contemplation of death; and it is to be inferred, that it was the intention of the donor that it should be held as a gift, only in case of his death. If a gift is made in expectation of death, there is an implied condition, that it is to be held only in the event of death. The cases of *Lawson v. Lawson* (1 P. Wms. 441); *Miller v. Miller* (3 P. Wms. 358); *Jones v. Selby* (Prec. Ch. 300), furnish, this rule." And see *Tate v. Leithead*, Kay, 658, 662.

If, however, it appear, from the circumstances of the transaction, that the donor intended to make an immediate and irrevocable gift, it will not be a good *donatio mortis causâ*. Thus, in *Edwards v. Jones*, 1 My. & Cr. 226, M. C. the obligee of a bond, five days before her death, signed an indorsement, not under seal, upon the bond, as follows: "I, M. C., do hereby assign and transfer the within bond or obligation, and all my right, title, and interest thereto, unto and to the use of my niece E. E., with full power and authority for the said E. E. to sue for and recover the amount thereof, and all interest now due, or hereafter to become due, thereon." It was argued, that if the gift could not, in consequence of its being incomplete, take effect as a *donatio inter vivos*, it would take effect as a *donatio mortis causâ*. But Lord Cottenham held that it could not take effect as a *donatio mortis causâ*, as an absolute and irrevocable gift was intended. "A party," observed his Lordship, "making a *donatio mortis causâ* does not part with the whole interest, save only in a certain event; and it is of the essence of such a gift that it shall not otherwise take effect. A *donatio mortis causâ* leaves the whole title in the donor, unless the event occurs which is to divest him. Here, however, there is an actual assignment, by which the donor, M. C., transfers all her right, title, and interest in the subject, to her niece; and that is really the whole evidence of the transaction; for the testimony of several persons, who were present, proves that it was intended as a gift; and though others speak as to an intention being expressed, inconsistent with the written document, very little attention can be paid to statements of what passed, when contradicted by the act of the party, as evidenced by a written instrument. . . . There is not very precise evidence as to the time when these bonds got into the possession of the plaintiff. There is also a defect of evidence, to show that at the time at which the transaction *took place, M. C. was in such a state of illness, or expectation of death, as would warrant a sup- [*927] position that the gift was made in contemplation of that event. These considerations, however, do not appear to be very material, because I consider the language of the assignment itself to exclude the possibility of treating this as a *donatio mortis causâ*."

Upon the same principle the gift of a cheque upon a banker is not good as a *donatio mortis causâ*, because it is a gift which can only be

made effectual by obtaining payment of it in the donor's lifetime, and is revoked by his death. See *Tate v. Hilbert*, 2 Ves. jun. 111.

Although there be an actual legal transfer of property such as standing by itself alone, would amount to a complete gift inter vivos, it will nevertheless be a donatio mortis causâ if there be annexed to the gift a condition either express or implied that it is only to take effect in the event of the death of the giver, and upon his recovery the donee will be a mere trustee (*Staniland v. Willott*, 3 Mac. & G. 664), unless there be a confirmation of the gift, so as to convert it into, or give it the effect of, an absolute irrevocable gift inter vivos (Ib. 681).

3. There must be a delivery or traditio of the subject of the gift to the donee for his own use (*Tate v. Hilbert*, 2 Ves. jun. 120); or upon trust for another person (*Drury v. Smith*, 1 P. Wms. 405; *Farquharson v. Cave*, 2 Coll. 367; *Moore v. Darton*, 4 De G. & Sm. 517; and see *Bibby v. Coulter*, Ridg. Ca. t. Hard. 206, n.); or for a particular purpose: see *Blount v. Burrow*, 4 Bro. C. C. 71, where the donor, twelve days before his death, delivered to the donee four India bonds, to enable him to carry on and maintain a law-suit, which the donor had commenced. Lord Commissioner Eyre held it to be a good donatio mortis causâ, but he directed an issue, to try whether the bonds were delivered.

It was, indeed, argued in *Hambrooke v. Simmons*, 4 Russ. 25, that a donatio mortis causâ could not be coupled with a condition, or made subject to a trust; but as an issue was directed, which left the question of law, as well as of fact, to the consideration of a court of law, the point was not decided. However, in the subsequent case of *Hills v. Hills*, 8 M. & W. 401, where a person on her death-bed gave a pocket-book, containing 80*l.* in cash and notes, to her brother, wishing that he should bury her, and that he should have all she had, it was held in the Exchequer, by Abinger, C. B., Parke, B., Alderson, B., and Rolfe, B., that it was a good donatio mortis causâ, although coupled with a trust. "I cannot see," said Mr. Baron Rolfe, "how the annexation of a trust to the gift can make any difference. If it be lawful so to give the property out and *out to the party for his own use, I cannot see [*928] that it makes any difference, that with it he is to pay for a particular thing. If a man on his death-bed gives another 1000*l.*, is it any addition to the evils attending this mode of bestowing property, that he attaches a condition to it; as, for instance, that he stipulates, that his brother shall receive an outfit to India? The case of *Blount v. Burrow* is expressly in point, and disposes of the question; and I have no doubt that other cases might be found."

These decisions rightly follow the civil law, according to which it is clear, that a donatio mortis causâ might be made the subject of a trust or condition. "Eorum quibus mortis causâ donatum est, fide committi quoquo tempore potest; quod fidei commissum, hæredes, Salva Falci-

diæ ratione, quam in his quoque donationibus exemplo legatorum, locum habere placuit, præstabunt. Si pars donationis fideicommisso teneatur, fideicommissum quoque munere Falcidiæ fungetur. Si tamen alimenta præstari voluit, collationis totum onus in residuo donationis esse reponendum erit ex defuncti voluntate, qui de majore pecuniâ præstari non dubiè voluit integra." Dig. lib. 31, tit. 1, l. 77, s. 1, cited 4 Russ. 27, 2 Coll. 356. "Ab eo, qui neque legatum neque fideicommissum, neque hæreditatem vel mortis causâ donationem accepit nihil per fideicommissum relinqui potest." Cod. lib. 6, tit. 1, 9, 42, cited 4 Russ. 27. Sed vide *Bibby v. Coulter*, Ridg. Ca. t. Hard. 206, n.

A delivery in order to be effectual must be made either to the donee himself or to some one for him. A mere delivery to an agent, in the character of agent for the giver, will not be sufficient (*Farquharson v. Cave*, 2 Coll. 356, 367); the delivery also when there are any declarations made by the donor relative to the subject-matter of the gift, should be contemporaneous with them: *Thompson v. Heffernan*, 4 D. & War. 285; *Hawkins v. Blewitt*, 2 Esp. 664); and even if there be a delivery to the donee or to some one for him, it will not be good unless the donor (subject of course to the ordinary condition making void the gift, which is always either expressed or implied in case of his recovery) parts with the dominion over the thing given. Thus in *Hawkins v. Blewitt* (2 Esp. 663), in an action of trover for a box containing money and wearing apparel, by an administrator, the case on the part of the plaintiff was, that the intestate in his last illness ordered the box to be carried to the house of the defendant, who was his aunt, and to be delivered to her; but he gave no other directions respecting it, nor said anything about giving it to her. It was, however, further given in evidence, that on the next day, the key was brought to the intestate, who desired it to be *taken back, saying that he should want some [*929] articles of clothing out of it. The plaintiff had a verdict. Lord Kenyon, C. J., said, "In the case of a donatio mortis causâ, possession must be immediately given; that has been done here: a delivery has taken place, but *is also necessary that by parting with the possession, the deceased should also part with the dominion over it.* That has not been done here. The bringing back the key by her the next morning to the intestate, and his declaration that he should want one of the articles of his apparel contained in it, are sufficient to show that he had no intention of making any gift or disposition of the box. It seems rather to have been left in the defendant's care for safe custody, and was so considered by herself." See also *Reddell v. Dobree*, 10 Sim. 244; *Tapley v. Kent*, 1 Robert, 400.

A delivery of a thing by way of symbol, according to the opinion of Lord Hardwicke, in the principal case, is not a sufficient delivery. Thus, he held that the delivery of the receipts for South Sea Stock was not a sufficient delivery to constitute a donatio mortis causâ, but he

said that an actual transfer, or something amounting to that, would have been necessary. And it has been held that the delivery of the book of a depositor in a savings-bank, is not a sufficient delivery to constitute a donation of the money deposited: *M'Gonnell v. Murray*, 3 I. R. Eq. 460. Nor will the delivery of a note not payable to the bearer (*Miller v. Miller*, 3 P. Wms. 356); nor in general of a cheque upon a banker (*Tate v. Hilbert*, 2 Ves. jun. 111; 4 Bro. C. C. 286), if not presented before the donor's death (*Hewitt v. Kaye*, 6 L. R. Eq. 198), although the pass-book be delivered up with the cheque (*Beak v. Beak*, 13 L. R. Eq. 489; 26 L. T. Rep. N. S. 281), be a sufficient delivery. See, also, *Bromley v. Brunton*, 6 L. R. Eq. 275, where the gift was inter vivos. The ground of these decisions is this, that a cheque has no relation to the donor's death: it is a gift to take place immediately, and, being merely an authority to receive a sum of money, it is effectually revoked by the death of the donor. However, in *Lawson v. Lawson*, 1 P. Wms. 41, where A., during his last illness, drew a bill upon a goldsmith for the payment of 100*l.* to his wife, with a written indorsement that the money was "to buy her mourning," and A. delivered the note to his wife, it was held that she was entitled to the money. And Lord Rosslyn, in *Tate v. Hilbert*, 2 Ves. jun. 111, notwithstanding Lord Hardwicke, in the principal case, throws some doubt upon it, considered the case perfectly well decided. "For," he observed, "taking the whole bill together, it is an appointment of the [*930] money in the banker's hands to the extent of 100*l.*, for *the particular purpose expressed in a written appointment; which is a purpose that necessarily supposes his death."

In *Jones v. Selby*, Prec. Ch. 300, where it was held by Sir John Trevor, M. R., that the delivery of the key of a trunk, with words of gift of the trunk and its contents, was a good delivery of a tally upon government for 500*l.* contained in the trunk, Lord Hardwicke observes, that the transaction "amounted to the same thing as a delivery of possession of the tally, provided it was in the trunk at the time."

In *Boutts v. Ellis*, 4 De G. M. & G. 249, a person four days before his death said to his wife: "I am a dying man, you will want money before my affairs are wound up." On the following day he signed and delivered to her a crossed cheque upon his bankers for 1000*l.*, and on the next day but one, remembering that the cheque was crossed, he asked a friend who visited him to take it; and give the wife another for it; which the friend did, but his cheque was post-dated. The donor's cheque was paid before his death to his friend, who, after that event, gave to the widow a cheque not post-dated for the other. It was held by the Lords Justices, affirming the decision of Sir J. Romilly, M. R. (reported 17 Beav. 121), that the transaction constituted a good donatio mortis causa.

The case of *Snellgrove v. Baily*, (3 Atk. 214, Ridg. Ca. t. Hardw.

202) has established, that there may be a donatio mortis causâ of a bond, though not of a mere simple contract debt, nor by the delivery of a mere symbol.—Per Sir John Leach, V. C., in *Gardner v. Parker*, 3 Madd. 185; and see *Blount v. Burrow*, 4 Bro. C. C. 71; *Hirst v. Beach*, 5 Madd. 351, 356; *Clavering v. Yorke*, 2 Coll. 363, n. So, likewise, of banknotes (*Shanley v. Harvey*, 2 Ed. Rep. 125; *Ashton v. Dawson*, Sel. Ch. Cas. 14); of a deposit-note given by a bank to the donor (*Witt v. Amis*, 1 Best & Sm. 109), and, it seems, also, of all other notes, or bills payable to the bearer (*Miller v. Miller*, 3 P. Wms. 356; *Hill v. Chapman*, 2 Bro. C. C. 612; and see *Jones v. Selby*, Prec. Ch. 300; *Bibby v. Coulter*, Ridg. Ca. t. Hard. 206, n.), or to order, though not indorsed by the donor (*Rankin v. Weguelin*, 27 Beav. 309; *Veal v. Veal*, Ib. 303). And the delivery of a bond is still sufficient as a donatio mortis causâ of the debt for which it is a security, although an action may, in certain cases, be maintained at law without profert of the bond: *Duffield v. Elwes*, 1 Bligh, N. S. 543. So likewise a policy of insurance on the life of the donor will pass by delivery as a donatio mortis causâ: *Witt v. Amis*, 1 Best & Sm. 109; *Amis v. Witt*, 33 Beav. 619.

A delivery of the mortgage deeds of real estate will constitute *a valid donatio mortis causâ. This was decided in the case of [*931] *Duffield v. Elwes*, 1 Bligh, N. S. 497; 1 Dow. & C. 1, in the House of Lords (reversing the decision of Sir John Leach, V. C., reported 1 S. & S. 239). In that case, a man, in contemplation of speedily approaching death, wishing to make a larger provision for his daughter than he had done by will, delivered, or caused to be delivered, to her, certain deeds, which consisted of, 1. A conveyance in fee of lands to secure 2927l., with the usual covenant for payment of the money lent, and a bond, by way of collateral security. 2. An assignment of a mortgage debt of 30,000l., and of a judgment for that sum recovered on a bond, with the conveyance of the land, and the usual covenant for the payment of the money. Sir John Leach, V. C., in deciding that the gift did not constitute a good donatio mortis causâ even of the bond, which accompanied one of the mortgages, observed, that where delivery would not constitute a complete gift inter vivos, it could not create a donatio mortis causâ, because it would not prevent the property from vesting in the executors; and, as a court of equity would not inter vivos compel a party to complete his gift, so it would not compel the executor to complete the gift of his testator. The delivery of a mortgage deed could not pass the property inter vivos: first, because the action for the money must still be in the name of the donor; and, secondly, because the mortgagor is not compellable to pay the money without having back the mortgaged estate, which could only pass by the deed of the mortgagee; and no court would compel the donor to complete his gift by executing such a deed. As to the case where the bond accompanied the mortgage, he came to the same conclusion, as

remains perfect. Lord Hardwicke immediately denied that proposition, and held, that if the possession of the donee do not continue, the gift is at an end :” *Bunn v. Markham*, 7 Taunt. 231.

But if the donor does not resume the gift, he cannot revoke it by will, for upon his death the gift becomes complete. See *Jones v. Selby*, Prec. Ch. 300 ; it was, however, decided in that case, that a donatio mortis causâ may be satisfied by a legacy.

It is clear that the donee may be put to his election, if the subject of the donation is bequeathed to another person, and some benefit is conferred by the will upon the donee. See *Johnson v. Smith*, 1 Ves. 314.

The Wills Act (1 Vict. c. 26) has not abolished donations mortis causâ, and they have been since expressly recognized by 8 & 9 Vict. c. 76, s. 4. With reference to this subject, Lord Justice Knight Bruce, when Vice-Chancellor, observed : “ I confess that it appeared to me not free from doubt, whether the Wills Act had not precluded any donations mortis causâ from taking effect. But it does not seem to have ever been so decided or so argued. If against the ordinary rules of construction, a statute passed for the purposes of the revenue can be referred to for the purpose of determining a question of law beyond its scope, it appears that a Revenue Act has in a manner recognized the existence of such gifts. My own opinion is, that according to the true interpretation of the Wills Act, that statute does not avoid such donations.” *Moore v. Darton*, 4 De G. & Sm. 519.

[A gift must ordinarily be absolute, or at all events not susceptible of being recalled by the donor. The right of property must pass irrevocably and at once ; and a condition that it shall not vest till the donor's death, or that it shall revert if he survives, will invalidate the transfer ; *The Bank v. Balcom*, 35 Conn. 351 ; *Craig v. Kittridge*, 46 New Hamp. 57. Such a condition is only admissible during the stress of illness, or of some present peril ; *Irish v. Nutting*, 47 Barb. 360 ; *Gourley v. Lisenbigler*, 1 P. F. Smith, 345. If one who is about to depart on a dangerous expedition places a bond or chattel in the hands of another for safe keeping during his life, and to

be delivered to a third person, if he does not return the thing given will belong to his executors, and not to the donee ; *Irish v. Nutting* ; *Gourley v. Lisenbigler*. It is not enough that the donor acts in view of death ; the danger must be instant or close at hand ; and a soldier who is about to join his regiment in time of war cannot make a *donatio causa mortis*, or any gift, which is to take effect in the event of his death during the campaign ; *Gourley v. Lisenbigler* ; *Irish v. Nutting* ; *Dexheimer v. Grantier*, 5 Robinson, 216. Such, at least, are the authorities where the gift is confided to a third person, to be handed over in the event of the donor's death ; and

the result would probably be the same if the delivery were immediate to the donee.

It would, nevertheless, appear that where money or securities are placed in the hands of one who promises to apply them to the use of a third person in the event of the donor's death, the transfer may be valid as a trust, although he reserves the right to draw on the fund, or stipulates that it shall be returned if he survives the peril which he is about to incur; *Blanchard v. Sheldon*, 43 Vermont, 512; *Baker v. Williams*, 43 Indiana, 547; and in *Gass v. Simpson*, 4 Coldwell, 288, and *Baker v. Williams*, 547, cases nearly the same as *Gourley v. Lisenbigler*, were determined in favor of the donee. So in *Virgin v. Gauthier*, 42 Illinois, 39, a gift of the bulk of a soldier's property on the eve of "his starting to the front," with a proviso, that it should be returned if he survived, was held to be valid, unless it was fraudulent as against his creditors. There seems to be no sufficient reason why a gift perfected by delivery, may not be subject to a condition that the right of property shall revert if the donor returns, or on the happening of any other event. See *Nicholas v. Adams*, 2 Wharton 17, 22. There may doubtless, said C. J. Gibson, in this case, "be a conditional gift where death is not expected; but in that case the condition would have to be expressed and the contingency specified; in the *donatio mortis causa* both are implied from the occasion."

Gifts *causa mortis* are not favored, from the opening which they afford to fraud; *Hatch v. Atkinson*, 56 Maine, 324; *Dale v. Lincoln*, 31 Id. 422. The evidence should be clear and explicit in every essential particular; *Jones v. Selby*, Prec. in Ch. 300; and it has been said that the uncorroborated testimony of the donee will not suffice; *Cutting v. Gilman*, 41 New Hampshire 147; see *Harris v. Clark*, 3 Comstock, 121; *Kenney v. The Public Ad'or*, 2 Bradford, 319. It must appear that possession was not surreptitiously obtained; and proof that the donee came into possession will not suffice, unless it is also shown that he did so in pursuance of the donor's wish or command; *Delamotte v. Taylor*, 1 Redfield, Surrogate R. 417, 421; *Kinney v. The Public Ad'or*. In the case last cited, one who had nursed a dying man produced his watch, and claimed to have received it as a gift, and it was held that he could not rely on his possession of the watch as evidence of delivery, and must call some disinterested witness to prove that the watch was placed in his hands as a gift. In like manner, a son, who has access to his father's papers at his death, cannot establish the forgiveness of a debt, by producing the note or bond with the signature torn off or cancelled; *Green v. Green*, 47 New York, 552.

A gift during extreme illness is presumably *causa mortis*, although nothing is said to indicate that the donor does not mean to part with the title absolutely, or intends that it shall revert if he

survives, *ante*; *Meacham v. Meacham*, 24 Vermont, 49; *Delamotte v. Taylor*, 1 Redfield, 417, 421. But the presumption may be excluded by proof that he was ignorant of his danger, or meant the donee to have the property in any event; *Rhodes v. Childs*, 14 P. F. Smith, 18. See *Dresser v. Dresser*, 46 Maine, 48. In *Meacham v. Meacham*, a gift by a deed from a husband in the last stages of consumption to his wife, which would have failed if regarded as absolute, as being out of due proportion to his means, *ante*, 434, was sustained by the aid of extrinsic proof that she was not to take unless he died, the court holding that the instrument should be reformed in accordance with the manifest design. It has been said on the other hand, that absolute words of gift will not be controlled by proof that the giver was on his death-bed, unless it appears affirmatively that he knew his danger, *Rhodes v. Childs*, and did not expect to live; but the question arose between the donee and next of kin, and might have been decided differently if the donor had recovered and reclaimed the property.

It is universally conceded that if the donor recovers, or survives the donee, the gift will fail. There is a third condition, that if the donor changes his mind, he may revoke the gift. There are numerous dicta to this effect. See *Redfield on Wills*, part second, p. 306, § 402; *Jones v. Selby*, Prec. in Ch. 300; *Wills v. Tucker*, 3 Binney, 370; *Nicholas v. Adams*, 2 Wharton,

22; *Parker v. Marston*, 27 Maine, 196; *Bedell v. Carroll*, 33 New York, 581; and the point arose, and was determined in *Merchant v. Merchant*, 2 Bradford, 445. The Surrogate said: "The three conditions annexed to the gift by the civil law, which on happening defeat the donation, are: 1st, the recovery of the donor; 2d, his repentance of the gift; 3d, the death of the donee before the donor's decease. These are separate and independent conditions." Ayliffe says, "The gift may be revoked by the donor's repenting thereof" (*Paragon*, 331; *Bracton*, lib. 2 cap. 26, § 1). In *Jones v. Selby*, Prec. Ch., 300, the chancellor said, "You agree that a *donatio causa mortis* is a gift in *praesenti*, to take effect in *futuro* after the party's death, as a will; and that it is revocable during his life, as a will is." Chancellor Kent speaks of these gifts as "conditional and revocable, and of a testamentary character." (2 Com. 445.) In *Wells v. Tucker*, 3 Binney, 370, Justice Tilghman says, It is contended on the part of the plaintiff, that a gift of this kind passes the property immediately, and is not subject to revocation by the donor. Without absolutely committing myself, I incline to the opinion, that in this as in several other particulars, it partakes of the nature of a legacy, and is revocable." In the same case, Justice Yeates describes the donation as "subject to countermand and revocation." In *Nicholas v. Adams*, 2 Wharton, 22, Justice Gibson states accu-

rately the three modes of defeasance acknowledged by the civil law. His language is, that it is "defeasible by reclamation—the contingency of survivorship, or deliverance from the peril." That a *donatio causâ mortis* cannot be revoked at the will of the donor, I find nowhere decided or distinctly asserted; while the rule of the civil law, that it could be revoked if the donor repented, even while it was uncertain whether or not he would recover, is clearly laid down in the Digest, and has been admitted to be the rule at common law, by a number of distinguished judges, although I am not aware the point has expressly arisen as the subject of distinct decision."

It seems that the birth of a child operates as a revocation of a *donatio causâ mortis*; *Bloomer v. Bloomer*, 2 Bradford, 347. But such gifts are not revocable by will, because a will does not speak until the donor's death has rendered the gift absolute; see *Merchant v. Merchant*, 2 Bradford, 445; *Nicholas v. Adams*, 2 Whar-ton, 17.

Delivery is essential to a gift. Whether it be *inter vivos* or *mortis causâ* there must be an actual handing over, with the intent to transfer the right of property and possession; *Johnson v. Stevens*, 22 Louisiana Ann. 144; *Hanson v. Millett*, 55 Maine, 184; *Carleton v. Lovejoy*, 54 Id. 46; *Egerton v. Egerton*, 2 Green, 419; *Dills v. Stevenson*, Id. 407; *Buschian v. Hughart*, 28 Indiana, 449; *Peiler v. Guilkey*, 27 Texas, 355; *Caswell*

v. Ware, 30 Georgia, 267; *Evans v. Lipscomb*, 31 Id. 71, *ante* 441.

A promise to give, or the most express words of gift, will not suffice, if the subject matter remains in the custody and under the control of the donor; *Frost v. Frost*, 33 Vermont, 639; *Parrish v. Stone*, 14 Pick. 198; *Little v. Willits*, 55 Barb. 125; 37 Howard, 481; *Wheatly v. Abbott*, 32 Mississippi, 343; *Hunter v. Hunter*, 19 Barb. 631; and it will make no difference that the donor's intention to vest the right of property in the donee is set forth in writing, unless the instrument is delivered; *Payne v. Powell*, 5 Bush. 248; *Phipps v. Hope*, 16 Ohio, N. S. 594; *Davis v. Boyd*, 6 Jones, 249; *Thomson v. Thomson*, 2 Howard, 745; *Pringle v. Pringle*, 9 P. F. Smith, 281. Where, said Sharswood, J., in *Pringle v. Pringle*, "there is a voluntary bond, or a gift of a security, or other chose in action, and the donor executes an assignment, whether under seal or otherwise, and retains the papers in his own possession, he retains at the same time entire control over the gift; he may cancel or destroy the transfer. No court of equity would compel the delivery of it to the donee, for a chancellor never interferes to enforce any contract not founded on a meritorious consideration." This decision is not easily reconcilable with the doctrine of *Morgan v. Mullison*, 10 L. R. Eq. 475, *ante*, 439.

In *Phipps v. Hope*, the donor enclosed a note in an envelope, with a memorandum that it was

intended for the donee, and that he should collect it and use the proceeds as he thought fit. There was also a written direction that his legal representatives should deliver the contents of the enclosure after his death. The Court held that the writing was invalid as a will, and that the gift failed as such for want of delivery. The Court said: "Here was no gift *inter vivos*, for there was no delivery during the life of the intestate, and no such delivery was intended by him. He exercised acts of ownership in respect to it several months after its deposit in the envelope, by receiving and indorsing a payment of interest; and by the terms of his indorsement on the envelope, he evidently contemplates a delivery only after his own decease. And to a valid gift *inter vivos* delivery and acceptance, either actual, constructive, or symbolical, are everywhere held to be essential; *Hamor v. Moore*, 8 Ohio, N. S. 239. Nor do the facts present the case of a gift *causa mortis*. A delivery during the life of the donor, and subject only to his power of revocation during his life, is as essential to a good gift *causa mortis* as to a gift *inter vivos*. Nor is the case of the plaintiff aided by the fact that after the death of the intestate the administrator delivered the note in question to the plaintiff. It is true the terms of the indorsement of the intestate upon the envelope assumed to authorize such delivery. But, in law it was pure assumption; for the authority assumed to be con-

ferred could be legally conferred only by last will and testament. If the writing enclosed in, and the endorsement written on, the envelope, be regarded as constituting an agency, they amount to nothing.

Ordinarily, the authority delegated to an agent ceases on the death of the principal. When, however, an instrument duly executed as a will contains a direction, that a bond or chattel shall be delivered after the donor's death, the gift is good as a pecuniary or specific legacy; *Smith v. Smith*, 5 Barr, 256.

The delivery must ordinarily be unequivocal and manifest, by ceasing from acts of dominion or ownership, and handing the thing over to the donee. A concurrent possession or control is at variance with, if it does not exclude the idea of a gift; *Cook v. Husted*, 12 Johnson, 188.

The difficulty of making an actual delivery is not a sufficient reason for dispensing with a form which the law regards as essential for the prevention of fraud and perjury. Where A. told B., "I will give you the corn growing in yonder field;" B.'s subsequent entry to gather the crop was held to be a trespass, and the Court doubted whether it was possible to make a valid gift of a standing crop without putting the donee in possession of the land. *Noble v. Smith*, 2 Johnson, 52. It would, nevertheless, appear that although such a license is revocable, in the first instance, it cannot be recalled after it has been carried into execution with the express or implied assent of the

donor; 2 American Lead. Cases, 570, 5 Am. ed.

In the case of a chattel, as of a deed, there may be a constructive delivery, although the thing remains in the donor's possession, if it appear sufficiently that he retained it as a custodian or trustee for the donee. See *Boughton v. Boughton*, 1 Atkyns, 625; *Pringle v. Pringle*, 9 P. F. Smith, 281, 287; *Souverbye v. Arden*, 1 Johnson's Ch. 240; *Methodist Episcopal Church v. Jacques*, 1 Johnson's Ch. 65; 17 Johnson, 548; *Grangiac v. Arden*, 10 Johnson, 293; *Allen v. Cowan*, 23 New York, 504. In *Grangiac v. Arden*, a father bought a lottery ticket, wrote his daughter's name upon it, and declared in the presence of the other members of the family that it was hers. He drew a prize, and when congratulated on his good fortune, reiterated the assertion that it was not his property; that he had purchased the ticket for his child; and that the proceeds belonged to her. These declarations were made on various occasions, and were held to establish the existence of a gift, although the money remained in the father's hands till his death.

In *Penfield v. The Public Ad'or*, 2 E. D. Smith, 305, "a man and woman lived in the same house, and he maintained and treated her as a daughter, and both had access to the room in which he had a trunk. Being about to go away, and being in another room of the house, he said to her, "My trunk, up stairs, and what is in it, I give to you;

there is enough in it to take care of you a spell." He went away, and returned in a few days, and occupied the room and used the trunk and clothes as usual, until he died, a short time thereafter. The woman took the trunk and contents after his death, and it then contained a pass-book in a saving bank. The court held, that there was a valid gift of the book, and of the money mentioned therein, standing to his credit in the bank.

In *Allen v. Cowan*, 23 New York, 504, the furniture of a house was sold under an execution. The greater part of it was in a room where the defendant in the writ, and his wife, were standing after the sale. The purchaser entered the room, and said to her: "I give you what is here, and all I have bought to-day." He then went away, and it was held to be a valid gift, vesting the right of property in the donee.

It seems that where the subject-matter is outstanding in the hands of a third person who promises to hold it for the donee, the gift may be valid, although the property is not surrendered to the donor, and handed back by him. See *Williams v. Fitch*, 18 New York, 548; *Sutherland v. Sutherland*, 5 Bush, 591; and the case is nearly, if not quite the same, when one who is in possession of a thing is directed to hold it as his own. See *Dean v. Dean*, 43 Vermont, 337; *Wing v. Merchant*, 57 Maine, 383; *Champney v. Blanchard*, 31 New York, 111. In *Champney v. Blanchard*, A. deposited a sum of money with

B., and took a receipt. On the morning of A.'s death he returned the receipt to B., saying that he gave the amount to him, and it was held to be a valid donation *causâ mortis*. Where, however, an uncle made a deposit in the name of his niece, and kept the bank book, a declaration during her last illness that she gave the money to him; that it was all his; was held invalid, because not attended by delivery; *French v. Raymond*, 29 Vermont, 623. The distinction between the cases seems to be, that in the former there was a symbolical delivery, which did not occur in the latter.

In *Williams v. Fitch*, 18 New York, 546, a daughter was entitled to a sum of money which had been for many years in the hands of her father, Bennet. Shortly before her death she was about to make a will bequeathing the fund to the plaintiff, when her father promised that if she would refrain, he would hold the money as the plaintiff's trustee or agent, and pay it over to him after her death. The court was of opinion that this was a good *donatio mortis causâ*; and if not, a trust arose for the plaintiff which a court of equity would enforce. Comstock, Justice, said "if Mr. Bennett had delivered the money and securities which he held for his daughter into her own hands, and she had redelivered them to him to hold in trust for the plaintiff after her decease, and he had accepted them upon that trust, I think the transaction would have been a valid gift *mortis causâ*. An actual delivery of

the thing intended to be given, to a person in trust for the donee, and the acceptance of the trust, would be sufficient to perfect a gift, whether *inter vivos* or in contemplation of death. The transaction in question was not attended with the formalities here suggested.

Bennett had the fund already in his hands, and there was no ceremony of delivery and redelivery. In place of that, his agreement was substituted, by which he placed himself in a trust relation to the plaintiff, and undertook to hold the property for his benefit after the decease of the donor. The formal acts of transfer and retransfer, it seems to me, were not essential, because those acts would have left the fund just where it was actually left, in the hands of Bennett, and impressed with the same agreement or trust. I incline, therefore, with some hesitation, to the opinion that the intended bounty of Frances Bennett in the plaintiff's favor took effect as a gift *mortis causâ*."

The principle was applied in another form in *Crawford's Appeal*, 11 P. F. Smith, 52. There a husband directed his bookkeeper to credit his wife with \$5,000 as cash received for her account, at the same time declaring his intention to add that much to the proceeds of a house belonging to her, and which he had sold at her request. The entry was made, and it was held that she thereby acquired a right to the money as against his executors. The court likened the case to a declaration

of trust, which might be good without a consideration.

The doctrine of constructive delivery is one which requires to be watched with care, and should not be allowed to prevail, unless the circumstances excuse the want of an actual transfer. See *Westulo v. De Witt*, 35 Barb. 215; *Delamotte v. Taylor*, 1 Redfield, Surrogate, 407. In *Cutting v. Gilman*, 45 New Hampshire, 141, a sister asked a dying brother for a keepsake. He replied that she might have the watch which was hanging at the head of his bed. She had the key, and had wound up the watch at his request during his illness; but it was held that inasmuch as the watch was not actually placed in the donee's hands, the gift was void.

The weight of authority is that possession must not only be transferred, but continue in the donee; and proof that it was resumed by the donor, will negative the gift, unless it appears that he acted as the donee's agent or bailee, or under an express or implied license from him; *Craig v. Craig*, 3 Barb. Ch. 76; *Cutting v. Gilman*, 47 New Hampshire, 147; *Hatch v. Atkinson*, 56 Maine, 324. In the case last cited the court said that legal policy required that the donee should not only take possession, but maintain it till the donor's death. However complete the delivery might be, if the subject matter came again into the donor's keeping, the gift was invalidated or revoked.

A subsequent delivery, or the donee's going into or taking pos-

session, may, nevertheless, render the gift valid by relation, or may operate as a new giving. See *Gillespie v. Burleson*, 28 Alabama, 551. But a delivery after the donor's death is necessarily invalid, although made at his express instance or desire, because the authority ceases with his life; *Session v. Mosely*, 4 Cushing; *Miller v. Jeffreys*, 4 Grattan, 412; *Phipps v. Hope*, 16 Ohio, N. S. 594.

A symbolical delivery is less open to falsification than one which is merely constructive. Handing over the key of a room in which goods are stored, or of the bill of lading for goods which are in transitu, may consequently pass the title to the goods themselves. So delivering a bank book with an intent to give, may confer a right to the amount standing to the credit of the donor; *Camp's Appeal*, 36 Connecticut, 88; *Penfield v. The Public Ad'or*, 2 E. D. Smith, 305. In *Tillinghast v. Wheaton*, 8 Rhode Island, 536, a wife handed a savings bank pass book to her husband during her last illness, and it was held to be a valid *donatio causâ mortis*. The point was, nevertheless, determined the other way in *Ashwood v. Ryan*, 2 Bush. 228.

The principle is the same where an instrument of gift is duly executed and delivered to the donee. This is generally conceded in the case of a deed; (See *Mears v. Mears*, 22 Vermont; *Iron v. Smallpiece*, 2 B. & Ald. 552; *M'Ewen v. Troost*, 1 Sneed, 186; *Caines v. Marley*, 2 Yerger, 582; *Nicholas v.*

Adams, 2 Wharton, 17, 24;) notwithstanding some cases in Mississippi, which look the other way; see *Thompson v. Thompson*, 2 Howard, Miss. 745; *Carnidine v. Hollins*, 7 Smedes & Marshall, 432; *Newell v. Newell*, 34 Miss. 385; *M'Millar v. Van Varter*, 35 Id. 428; and it should be equally true of any writing which leaves no doubt of the intention to make a present gift, *ante*, 438, see *Singleton v. Walton*, 21 Georgia, 261. Such at least is the recent course of decision in England, although it was long held that the legal title cannot pass without delivery, and that equity will not aid a volunteer; *Nicholas v. Adams*, 2 Wharton, 17, 24, *ante*, 435.

It has, nevertheless, been said, on the authority of the language held in *Ward v. Turner*, that the delivery of one thing cannot enure as the delivery of another and different thing, *ante*. To constitute a good symbolic delivery, the symbol must represent the subject-matter, or afford the means of access to, or of dominion over it. A deed of gift does not come within this definition, and operates not as a symbolic or constructive delivery of the subject-matter, but through the estoppel of the seal, by precluding the donor and those claiming under him, from denying the recital that possession has actually been transferred. It follows, that as no such estoppel exists in the case of an unsealed instrument, it cannot be effectual as a gift; *Jagers v. Estes*, 3 Strobbart Eq. 379; *Connor v. Travic*, 28 Alabama, 289.

All the authorities agree, that a promise to give is necessarily inoperative unless sustained by a consideration, or under seal, and an instrument which reserves the right of property, or possession, during the donor's life, or leaves it subject to his control, will have no greater effect than such a promise; *Davis v. Boyd*, 6 Jones, 249; *Leisenbergher v. Gourley*, 6 P. F. Smith, 166. So, the most formal deed of transfer will not operate as a gift unless the instrument is delivered to the beneficiary; *Pringle v. Pringle*, 9 P. F. Smith, 281; although the circumstance that it is retained by the donor, is not necessarily conclusive against delivery; *Brown v. Winthrop*, 1 Johnson Ch. 329.

In *Hatch v. Atkinson*, 56 Maine, 254, it seems to have been thought that the securities in a trunk will not pass by the delivery of the key; but the true ground of the decision seems to have been, that there was no sufficient evidence that the key was handed over with an intent to give. It is not humane or just to require one in the extremity of illness, and confused by the approach of death, to unlock the receptacle in which his valuables are kept, and transfer them to the donee; and the delivery by one thus situated, of the key of a desk, trunk, or fireproof, containing bonds, jewelry, or money, may pass the title to the goods themselves; *Cooper v. Burr*, 45 Barb. 91; see *Jones v. Selby* Prec. in Chancery, 300; *Noble v. Smith*, 2 Johnson, 55. Every case must, however, to some extent, be

governed by its own circumstances, and when the donor has the securities in his hands, looks them over, and replaces them in the trunk or desk, instead of handing them to the donee, it may well be doubted whether he intends to make a present, gift, or is merely expressing a purpose, which he means to carry into effect at some future period; *Atkinson v. Hatch*.

In general, any transfer that would be effectual in the case of a *donatio causâ mortis*, will also sustain an absolute gift; *Bedell v. Carll*, 33 New York, 581; but it has been held in Massachusetts, that although a delivery to a third person may suffice in the former case, it is not good in the latter; *Sessions v. Mosley*, 4 Cushing, 92. See *Windows v. Mitchell*, 1 Murphy, 121. "The difference," said Chief Justice Shaw, "between a gift *inter vivos* and a gift *causâ mortis*, is this: the former is absolute, irrevocable, and complete, whether the donor die or not; the subject of it must, therefore, be delivered to the donee, or to some other person, with his consent, for his use, and must be accepted by him; *Grover v. Grover*, 24 Peck, 261. If, therefore, it be delivered to a third person, with authority to deliver it to the donee, this depositary, until the authority is executed by an actual delivery to and acceptance by the donee, is the agent of the donor, who may revoke the authority, and take back the gift; and, therefore, if the delivery do not occur in the donor's lifetime, the authority is revoked by his death, the property does not pass, but

remains in the donor, and goes to his executor or administrator. But if intended as a gift *causâ mortis*, it could not become absolute and irrevocable till the death of the donor; and, therefore, if delivered to and accepted by the donee, after the decease of the donor, it is sufficient."

This argument leads to the illogical result, that the other circumstances being the same, a gift may fail, because the donor intends that it shall be absolute. If a father says during his last illness: "Give this to my son when he comes home, he will need it whether I live or die," the delivery is insufficient, and the son will take nothing unless he returns before his father's death. But if the father says: "Give this to my son if I do not recover," the right of property passes, although liable to be recalled. In other words, the urgent need of the son, and the desire of the father to benefit him at all events, is made a reason for defeating the gift.

The question seems to be one of fact rather than law. A gift intrusted to the donor's servant or agent for delivery, may be recalled before it reaches the donee. But a delivery to a third person as the donee's agent, is a delivery to him, and his assent will be presumed to an act done for his benefit. See *De Lewellain v. Evans*, 39 California, 320; *Marston v. Marston*, 1 Foster, 491; *Verplank v. Storey*, 12 Johnson, 536. This is generally conceded of a grant by deed; *Reed v. Robinson*, 6 W. & S. 331; *Wilt v. Franklin*, 1 Binney, 502; and it ap-

plies where the title passes without a writing, by transmutation of possession. To hold otherwise, would fetter the *jus disponendi*, by rendering it difficult, if not impracticable, to give to any one who is at a distance. In *Reed v. Robinson*, Gibson, C. J., said, "the doctrine maintained by the masterly argument of Justice Ventris, in *Thompson v. Leach* (2 Vent. 201), and eventually established by the decision of that case in the House of Lords, is that a common law conveyance put into the hands of an agent for transmission to the grantee, takes effect the instant it is parted with, and vests the title, though the grantee be ignorant of the transaction; and that the rejection of such a grant has the effect of re-vesting the title in the grantor, it would seem, by a species of remitter." There is no difference in point of principle between such a case and that where a chattel is delivered to one man for the use of another, the question in both cases, being, did the grantor mean to part irrevocably with the right of property and that it should vest forthwith in the grantee. In *Blanchard v. Sheldon*, 43 Vermont, 512, A. gave B. \$300, and received a written promise to repay it on demand, and if she did not call for it, to C. after her death; and it was held that on A.'s death C. became entitled to the fund. So a deposit in a bank to the credit of a third person, may enure as a gift to him; 32 Maryland, 78; *Howard v. The Bank*, 40 Vermont, 547; and the law was so held in *Howard v. The Bank*, although the bank book

remained with the donor till his death.

All the authorities agree that to render a gift effectual, there must be a transfer, placing the subject matter beyond the reach or control of the giver, and conferring the right of property and possession on the donee, or on some one for his benefit; *Hatch v. Davis*, 3 Maryland, Ch. 266; *Dole v. Lincoln*, 31 Maine, 22. Handing a note to a third person, with instructions to collect the money and apply it to the use of some one whom the donor desires to aid, is consequently not a good delivery, unless he accepts it as the donee's agent, because the authority may otherwise be countermanded before it has been carried into execution; *Thompson v. Dorsey*, 4 Maryland, Ch. 149.

Whatever the rule may be under other circumstances, it is clear that if one who will be entitled to personal property under the statute of distributions, or as legatee if the owner does not make a will, promises the latter to hold or transfer the property for the use of a third person, after he is gone, the promise will be enforced on the ground of fraud, or because a consideration results from the promisee's forbearing to bequeath the property; *Parker v. Urie*, 9 Harris, 305; *Williams v. Fitch*, 18 New York, 548; *Pringle v. Pringle*, 9 P. F. Smith, 281, 287, ante, 352, notes to *Dyer v. Dyer*, see *Jordan v. Money*, 5 House of Lords, 185, 250. "Where," says Lewis, C. J., in *Parker v. Urie*, "one on his death-bed expresses a wish to his

heir-at-law, that certain persons whom he names, shall receive of his estate specified articles and sums of money as gifts from him, and the heir promises him that his request shall be fulfilled, the necessary implication is, that the promise is to be performed after the death of the promisee, and that the consideration is that the promisor shall succeed to his estate under the intestate laws."

The donor's declaration that he has given or delivered, will not supply the want of proof of the actual transfer of possession which the law requires; *Rockwood v. Wiggin*, 16 Gray, 402; but it seems that when the donee is in possession, such declarations may suffice to show a gift; *Doty v. Wilson*, 47 New York, 580; *Dean v. Dean*, 43 Vermont, 347; and they are clearly admissible in corroboration of the donee's testimony that possession was delivered, and not surreptitiously obtained; *Rhodes v. Childs*, 14 P. F. Smith, 18; *Doty v. Wilson*; *Evans v. Lipscomb*, 31 Georgia, 71.

The burden of proof is on the donee, and he must show not only that the subject matter was handed over, but that the transfer was made with the intent to pass the right of property; and ambiguous expressions will be interpreted against him, and in favor of the donor and his legal representatives; *Prickett v. Prickett*, 5 C. E. Green, 478; *First National Bank v. Balcom*, 35 Conn. 351; *Boudreau v. Boudreau*, 45 Ill. 480; *Dills v. Stevenson*, 2 Gray, 497; *Egerton v. Egerton*, 2 Id. 419.]

"A *donatio causâ mortis*," says Tilghman, C. J., in *Wells v. Tucker*, 3 Binney, 366, 370, "is a gift of a personal chattel, made by a person in his last illness, subject to an implied condition, that if the donor recovers, the gift shall be void. So also it shall be void, if the donee dies before the donor;" *Michener v. Dale*, 11 Harris, 59; *Gourley v. Leisenbigler*, 1 P. F. Smith, 350. But the nature of a gift *mortis causâ* is more fully and accurately expounded by Gibson, C. J., in *Nicholas v. Adams*, 2 Wharton, 17, 22, than by any judge. "Perhaps the best definition of this species of donation in the books of the civil law," he remarks, "and the one which best corresponds to the best impressions the subject has received from the Anglo-Saxon jurists—who seem to be returning to the point from which they started—is, that which is found in Justinian's Institutes, Lib. 2, Tit. 7: "*Mortis causâ donatio est quæ, propter mortis fit suspicionem; cum quid ita donat, ut si quid humanitus ei contigisset haberet is qui accepit; sin autem supervixisset, is qui donavit reciperet, vel si eum donationis pœnituisset, aut prior decesseret is cui donatum sit.*" Not a word in any part of this about sickness, first or last. Contested death-bed donations are of such occurrence in the courts, as to have superseded all others, and to have grown, in the apprehension of the judges, from a species to a genus; and hence the notion that they are referable exclusively to death-bed sickness. If made in sickness, it must neces-

sarily be the last sickness; for the contingency happens adversely to the donee, where the donor is restored to health. But this notion seems to be yielding to more comprehensive principles. In his Treatise on Legacies, page 26, Mr. Roper, whose accuracy as a text-writer is creditable to him, says, it is necessary that the gift be made in peril of death, or during the donor's last illness, and to take effect only in case he dies. This would be critically correct, were it not redundant in one particular, and too narrow in another; redundant, because it is indifferent whether the peril of death be induced by sickness or any other cause. Thus, the peril past, the gift of a soldier or a malefactor might be retracted, though made in perfect health, when going to execution or to battle. But his position is also too narrow in one particular; for a groundless apprehension of death is necessarily as operative to make a gift conditional, as if the danger were real. No one would hesitate to say that the gift of a man in the predicament of Parolles, when sportively doomed by his friends, in the guise of ferocious enemies, might be recalled. I would, therefore, briefly define a *donatio causâ mortis* to be a conditional gift, dependent on the contingency of expected death. There may, doubtless, be a conditional gift, when death is not expected; but in that case, the condition would have to be expressed, and the contingency specified; in the *donatio causâ mortis*, both are implied from the occasion. But

it is certainly not necessary that the donor be in such extremity as is requisite to give effect to a nuncupation, which is sustained from necessity merely, where the donor was prevented by the urgency of dissolution, from making a formal bequest. Between these ways of disposition, there is not one approximating line. *Donatio causâ mortis* is sometimes spoken of as being distinct from a gift *inter vivos*; the former being sometimes supposed to be made in reference to the donor's death, and not to vest before it—but inaccurately as it seems to me; as this gift, like every other, is not executory, but executed in the first instance, by delivery of the thing, though defeasible by reclamation, the contingency of survivorship, or deliverance from peril. The donee would certainly not be bound to make compensation for the intermediate use of the thing; and evidently because the intermediate ownership was vested in him. The gift is consequently *inter vivos*. All agree that it has no property in common with a legacy, except that it is revocable in the donor's lifetime, and subject to his debts in the event of a deficiency. The first is, not because the gift is testamentary, but because such is the condition annexed to it; and the second, not because it is in the nature of a legacy, but because it would otherwise be fraudulent as to creditors; for no man may give his property, who is unable to pay his debts. It is decisive, that the subject is not within the jurisdiction of the ecclesiastical courts;

and the donee, consequently, takes paramount to the executor or legatee. "*Donatio mortis causâ*," says the court, in *Raymond v. Sellick*, 10 Connecticut, 480, 484, 485, "differs from a gift *inter vivos* in several respects, in which it resembles a legacy. It is ambulatory, incomplete, and revocable during the donor's life. The revocation may be effected either by the recovery of the donor from his disorder, or by taking back the possession of the property. It can be made to the wife of the donor. On the other hand, it differs from a legacy in several particulars. The claim need not be proved in a court of probate. The title of the donee becomes, by relation, complete and absolute from the time of the delivery. No consent or other act, on the part of the executor or administrator, is necessary to perfect the title of the donee. It is a claim against the executor; a legacy is a claim from the executor." See, to the same effect, *Harris v. Clark*, 2 Barbour's S. C. 94, 96; *Parish v. Stone*, 14 Pickering, 198, 203.

To constitute a *donatio mortis causâ*, it is necessary that the gift be made in contemplation of the conceived approach of death, and with a view of being void in case the donor survives; *Grattan v. Appleton et al.*, 3 Story, 755, 763; *Weston v. Hight*, 17 Maine, 287, 290; *Raymond v. Sellick*, 10 Connecticut, 480, 484, 485; *Harris v. Clark*, 2 Barbour's S. C. 94, 96; *Holley v. Adams, Adm'r*, 16 Vermont, 206, 210, 212; *Smith et al. v. Kitttridge et al.*, 21 Id. 238, 245;

Hebb et al. v. Hebb, 5 Gill. 506; *Gilmore v. Whitesides and others*, Dudley's Equity, 14, 18. Though subject to defeasance by the donor's restoration from danger, and in other ways, the property must pass at the time, and not to be intended to pass at the giver's death; *Duncan's Adm'rs v. Duncan*, 5 Littell, 12, 13; *Wolden's Adm'r v. Dixon*, 5 Monroe, 170, 171. If the danger of death passes by, the gift is void; *Weston v. Hight*, 17 Maine, 287, 290; and the gift is revocable by the donor during his life; *Parker v. Marston*, 27 Maine, 196, 203; *Nicholas v. Adams*, 2 Wharton, 17, 23. It does not require the assent of the executor, but it will not prevail against the creditors. See *Grover v. Grover*, 24 Pick. 264; *Sessions v. Mosely*, 4 Cushing, 87; *Bates v. Kenton*, 7 Gray, 384; *Chase v. Redding*, 13 Id. 416; *Borneman v. Sidlinger*, 15 Maine, 429.

It is essential to the validity of a gift, that it shall be perfected by delivery at the time or while the donor is alive; *Sessions v. Mosely*, 4 Cushing; *Jones v. Smallpiece*, 2 M. & S. 551. A direction that subject matter shall be delivered at or in the event of his death, will not suffice, because the order is revoked by the happening of the contingency in which it is to be fulfilled; *Sessions v. Mosely*; *Phipps v. Hope*, 16 Ohio, N. S. 586; *Gourley v. Lisenbigler*, 1 P. F. Smith, 845; *French v. Raymond*, 39 Vermont, 626. A gift *mortis causâ* is as much within this rule, as if it were absolute. There must be a present delivery

passing the right of property and possession; *Jones v. Smallpiece*, 2 M. & S. 551. In the civil law, some species of *donatio mortis causâ* were valid without delivery, but in common law, the cases are uniform in declaring that a delivery, according to the subject of the gift, is in every instance necessary: *Bowers v. Hurd*, *Adm'r*, 10 Massachusetts, 427, 429; *M'Dowell v. Murdock*, 1 Nott & M'Cord, 237, 239; *Gilmore v. Whitesides and others*, *Dudley's Equity*, 14, 18, 23; *Grattan v. Appleton et al.*, 3 Story, 755, 763; *Raymond v. Sellick*, 10 Connecticut, 480, 484; *Harris v. Clark*, 2 Barbour's S. Ct. 94, 96; *Huntingdon v. Gilmore*, 14 Id. 243; *Holley v. Adam's Adm'r*, 16 Vermont, 206, 210, 212; *Carpenter v. Dodge et al.*, 20 Id. 596; *Roberts v. Wills*, *Spencer*, 591; *Hobb v. Hobb*, 5 Gill, 516; *Jones v. Dyer*, 16 Alabama, 231; *Noble v. Smith*, 2 Johnson, 56; *Chevalier v. Wilson and Wife*, 1 Texas, 161, 174; *Duncan's Adm'r's v. Duncan*, 5 Little, 12, 13; *Ewing v. Ewing*, 2 Leigh, 337, 341, 344; *Barker v. Barker's Adm'r*, 2 Grattan, 344; *Lee v. Luther*, 3 Woodbury & Minot, 519. "It is a wise principle of our law that delivery is essential, because delivery strengthens the evidence of the gift. Too much care cannot be taken in insisting on the most convincing evidence in cases of this kind; for these donations do in effect amount to a revocation *pro tanto* of written wills; and being subject to the forms prescribed for nuncupative wills, they are cer-

tainly of a dangerous nature." *Per* Tilghman, C. J., in *Wills v. Tucker*, 3 Binney, 366, 360. Such donations are not the less gifts because they are gifts upon condition, and they must, consequently, have all the elements necessary to the validity of gifts in other cases.

The delivery must be according to the manner in which the particular thing is capable of being delivered; *Pennington, Adm'r of Patterson, v. Gitting's Ex'r*, 2 Gill & J. 209, 216; and the delivery of the key of a chest, may be a good delivery of its contents, even when they consist of promissory notes and other securities for the payment of money; *Jones v. Brown*, 34 New Hampshire, 439.

"A *donatio mortis causâ*," says the court in *Miller and Wife v. Jeffress et als.*, 4 Grattan, 472, 479, "is of a mixed character, partly testamentary and partly donative; from an indulgence to the nature of the emergency, the law dispenses with the solemnities of a testament; and for that very reason requires the essentials of a gift. A delivery is indispensable to the validity of a *donatio mortis causâ*. It must be an actual delivery of the thing itself, as of a watch or a ring; or of the means of getting the possession and enjoyment of the thing, as of the key of a trunk or a warehouse in which the subject of the gift is deposited; or, if the thing be in action, of the instrument by using which the *chose* is to be reduced into possession, as a bond, or a receipt, or the like. . . . It is

not the possession of the donee, but the delivery to him by the donor, which is material, in a *donatio mortis causâ*; the delivery stands in the place of nuncupation, and must accompany and form a part of the gift; an after-acquired possession of the donee is nothing; and a previous and continuing possession, though by the authority of the donor, is no better. The donee, by being the debtor, or bailee or trustee of the donor, in regard to the subject of the gift, stands upon no better footing than if the debt or duty were owing from a third person." And this view is sustained by *Lee v. Luther*, 3 Woodbury & Minot, 519. See *Sims v. Walker*, 8 Humphreys, 503, 505.

A delivery to a third person for the use of the intended donee, is a valid *donatio causâ mortis*; *Wells v. Tucker*, 3 Binney, 366, 370; *Coutant v. Schuyler*, 1 Paige, 316, 318; *M'Gillicuddy v. Cook*, 5 Blackford, 179, 180; *Borneman v. Sidlinger*, 15 Maine, 429; 18 Id. 225; 21 Id. 185; *Sessions v. Mosely*, 4 Cushing, 87. In like manner the property may be delivered to one of several donees for the use of all; *Dresser v. Dresser*, 46 Maine, 48.

"There are many strong expressions in the books of the common law," said the Assistant Vice-Chancellor in *Brinckerhoff v. Lawrence*, 2 Sandford, 401, 406, "against sustaining donations, either *mortis causâ* or *inter vivos*, without actual delivery. The reason of this is, that gifts of both classes are usually claimed upon

parol evidence, unsustained by any writing; and the courts have uniformly set their faces against such claims, on account of the great danger of perjury. Where the intent of the donor is proved under his own hand, there is no such danger, and the courts have accordingly presumed a delivery in support of the gift, on slight evidence. So far as concerns the question of intent, a writing may be more satisfactory than parol; but the principle as to the necessity of delivery to the completeness of the transaction is the same in both cases. Agreeably to this view an actual transfer is essential, and its place cannot be supplied by setting forth the intention to give in writing and delivering the instrument to the donee; *Bann v. Markham*, 2 Marshall, 532, *ante*. It has been held in like manner that a deed conveying chattels will not make a valid *donatio mortis causâ*, unless they are delivered; see *Gilmore v. Whitsides and others*, *Dudley's Equity*, 14, 18; *Nicholas v. Adams*, 2 Wharton, 17, 24. The better opinion, nevertheless, seems to be, that the delivery of a deed of gift may pass the title to the chattels or securities which are the subject-matter, although they are not actually handed over to the donee; *Jones v. Smallpiece*, 2 M. & S. 551, 554, *ante*; and the law was so held in *Mears v. Mears*, 22 Vermont.

The principle established in *Ward v. Turner*, and the authority of that decision, were fully recognized and enforced in

Pennington, Adm'r of Patterson, v. Gilling's Ex'or, 2 Gill & Johnson, 209, which closely resembled *Ward v. Turner*. The decedent, in immediate expectation of death, had delivered to his daughter, a certificate of bank stock, at the same time indorsing his name on the back of the certificate, and telling his daughter that he gave the stock to her. The donation was held invalid. "It appears upon the face of the certificate itself," said Buchanan, Ch. J., "that the stock was transferable at the bank only, and it is admitted that the indorsement, whether in blank or in full, did not, and could not, operate to transfer the stock; and as it was the stock and not the certificate that was the subject of the intended gift, it matters not whether the indorsement was in full or in blank; for, as in the case of the check on the banker, which not being presented and paid in the lifetime of the maker, the intended donation of the money was defeated for want of delivery, notwithstanding the holder of the check might, by presenting it in the lifetime of the maker, have obtained the money, and thus perfected the gift; so here, even if by the indorsement of the certificate, whether filled up or remaining in blank, the donee might have gone to the bank in the lifetime of her father, and caused a transfer of the stock to herself on the books of the bank, the only way in which the stock, the thing that was intended to be given, could be delivered, and thus have

perfected the donation; yet, not having done so, it was not a valid gift of the stock, either in law or equity, for want of delivery;" see *ante*, 400.

"Whatever differences there may be amongst the courts of some of the States," said Shaw, Ch. J., in *Coffin and Wife v. Otis*, 11 Metcalf, 156, 161, "in regard to what may be the subject of a gift *mortis causa*, it is, we believe, agreed on all hands, that it must be some chattel, or some note or other security for money, capable of tradition or manual delivery; and that there must be an actual delivery either to the donee, or to some person for his use."

It is perfectly settled in the present day, that *choses in action*, or at least, instruments creating a liability against a third party, held by the donor, are the subject of a valid *donatio mortis causa*. A bond is undoubtedly the subject of a good donation *mortis causa*; *Wells v. Tucker*, 3 Binney, 366; *Waring v. Edwards*, 11 Maryland, 424; *Lee v. Boak*, 11 Grattan, 182. And the American cases conclusively establish that the promissory note of a third person stands in this respect upon the same footing with a bond; and it matters not whether the note be payable to bearer, or indorsed in blank, so that the legal title passes by delivery, or whether it be payable to the donor only, and the delivery vests but an equitable title in the donee; in the latter case, the donee would be entitled to use the name of the administrator of the donor's es-

tate, in suing upon the note, and may control the administrator if he attempts to sue for the benefit of the estate generally; *Coutant v. Schuyler*, 1 Paige, 316, 318; *Westulo v. De Witt*, 36 New York, 340; *Holley v. Adams, Adm'r*, 16 Vermont, 206, 211; *Smith v. Kittridge et al.*, 21 Id. 238, 242; *Grover v. Grover*, 24 Pickering, 261, 264, 266; *Sessions v. Mosely*, 4 Cushing, 87; *Borneman v. Sidlinger*, 15 Maine, 429; 18 Id. 225; 21 Id. 185; *Parker v. Marston*, 27 Id. 196, 204; *Brown, Ex'r, v. Brown*, 18 Connecticut, 410, 413; *Jones v. Dyer*, 16 Alabama, 221. "Notwithstanding the attempts which have been made in England," said the chancellor, in *Coutant v. Schuyler*, "to distinguish between a promissory note and a bond, in relation to the validity of the gift of a *chose in action*, there cannot, in reason, be any difference. A gift of either is valid as a symbolical delivery of the debt due on the note or bond, and all the delivery of which the subject is capable." A note, secured by mortgage, passes equally well by a gift and delivery *mortis causá*; *Brown, Ex'r, v. Brown*; *Borneman v. Sidlinger*. So the check or draft of a third person may be given *inter vivos*, or in view of impending death; *Rhodes v. Childs*, 14 P. F. Smith, 18; *Gourley v. Lisenbigler*, 1 Id. 345.

But it is equally well settled, that the donor's own promissory note to the donee, or any other executory promise of his without consideration, cannot be the subject of a *donatio mortis causá*; *Raymond v.*

Sellick, 10 Connecticut, 480, 485; *Parish v. St ne*, 14 Pickering, 198, 204; *Holley v. Adams, Adm'r*, 16 Vermont, 206; *Smith v. Kittridge, Adm'r*, 21 Id. 238; *Brown v. Moore*, 3 Head. 361; *Flint v. Pettee*, 33 New Hampshire, 520; *Harris v. Clark*, 2 Barbour, 94; 3 Comstock, 93; *Craig v. Craig*, 3 Barbour's Chancery, 78, 118, *ante*, 446. In like manner, the gift of a draft, drawn by the decedent on a third person, so far as it can be made available as a security, or as a written evidence of debt, against the drawee, may be valid as *donatio mortis causá*; but as creating any liability against the estate of the drawer, in the event of the drawee not paying, it is inoperative. So, the indorsement, by the donor, *mortis causá*, of a promissory note made to him, creates no liability against his estate; *Werton v. Hight*, 17 Maine, 287, 290. A bond executed and delivered as a gift or advancement, does not, however, fall within the scope of this principle; the seal supplying the want of a consideration, and making the act binding as a contract, if not as a donation; *Candon's Appeal*, 3 Casey, 119, *ante*, 444. And it would seem well settled, that a debt may be forgiven *causá mortis*, by a delivery or surrender of the note, or other instrument, which constitutes the evidence of its existence, to the debtor or to a third person, for his benefit; *Gardner v. Gardner*, 22 Wend. 521; *Lee v. Bouck*, 11 Grattan, 182.

The history, and present condition of the law, upon these points,

are very satisfactorily traced by Shaw, C. J., in *Parish v. Stone*, 14 Pickering, 198, 204, 205. "The necessity of an actual delivery," he remarks, "has been uniformly insisted upon, in the application of the rules of the English law to this species of gift. It was, in some measure, from the strict application of this rule, and from the impossibility of making an actual delivery of that species of property, that it was long doubted whether *choses in action*, that is, bonds, notes, and other securities for money, could, in any way, be the subject of such a gift. In the case of *Ward v. Turner*, 2 Ves. sen. 431, where the whole subject was very fully discussed, and where the doctrine of actual delivery was insisted on as indispensable, it was held by Lord Hardwicke, that a gift of receipts for South Sea annuities was not a good *donatio causâ mortis*, principally because the property in the stock did not pass by a delivery of the receipts, but a transfer was necessary, which was not made. But it has since been decided, that a delivery of such securities and *choses in action*, as pass a property to the bearer by delivery, may properly be the subject of this species of gift, where the securities are delivered, as bank notes or specie bills; *Drury v. Smith*, 1 P. Wms. 404; lottery tickets; *Gold v. Rutland*, 1 Eq. Cases, Abr. 346; and Exchequer tallies; *Jones v. Selby*, Prec. Chan. 300. And there can be no reasonable doubt that a promissory note payable to bearer, or indorsed

in blank, so as to pass by delivery, might also pass by a gift and actual delivery, as a *donatio causâ mortis*."

"But whatever doubt may have existed at one period, it has been decided, that as an assignment of a *chose in action* transfers the equitable interest, and as such equitable assignment is manifested by a delivery over of a bond or other security for money, a gift of such a bond accompanied by an actual delivery, vests an equitable interest in the donee, and the executors of the donor, in whom the legal interest remains, are mere trustees for the donee, and bound to permit the donee to use their names, to enforce the payment of the bond at law; *Snellgrove v. Baily*, 3 Atk. 214; *Gardner v. Parker*, 3 Maddock, 184; *Blount v. Burrow*, 4 Bro. C. C. 72. And as a confirmation and necessary consequence of this doctrine, it has also been held, that a bond and mortgage may be a good subject of a gift; that an equitable interest in the money secured by the personal obligation, passes by a gift and delivery over of the security; that the mortgage attends and follows the debt, as an inseparable incident; that although the legal interest in the debt vests in the executor, and that of the mortgaged premises in the heir of the donor, yet in equity they are both to be considered trustees for the donee of the debt or sum of money secured by the mortgage, the executor, to permit the donee to sue in his name on the personal security, and the heir, to convey the

mortgaged premises, in security of the debt; *Duffield v. Elwes*, 1 Bligh's New Rep. 514; S. C., under the name of *Dow v. Hicks*, 1 Dow & Clark, 1, in the House of Lords. These cases all go on the assumption that a bond, note, or other security, is a valid subsisting obligation for the payment of a sum of money, and the gift is, in effect, a gift of the money by a gift and delivery of the instrument which shows its existence and affords the means of reducing it to possession; all which ingredients are wanting in his own note given by the donor to the donee, without consideration, which is a mere gratuitous promise."

"As to the character of the thing given, the law has undergone some changes. Originally it was limited, with some exactness, to chattels, to some object of value deliverable by the hand; then extended to securities transferable solely by delivery, as bank-notes, lottery-tickets, notes payable to bearer, or to order, and indorsed in blank; subsequently it has been extended to bonds and other choses in action in writing, or represented by a certificate, where, in the very latest cases on the subject in this Commonwealth, it has been held, that a note not negotiable, or if negotiable, not actually indorsed, but delivered, passes, with a right to use the name of the administrator of the promisee, to collect it for the donee's own use; *Sessions v. Mosely*, 4 Cush. 87; *Bates v. Kempton*, 7 Gray, 382. For the general principle we refer to 2 Kent Com. (6th ed.)

444; *Parish v. Stone*, 14 Pick. 203; *Chase v. Redding*, 13 Gray, 420. The donation in this instance was *mortis causâ*, but the principle is the same in the case of an ordinary gift."

[An unaccepted bill of exchange or draft drawn generally, does not operate as an equitable assignment of the fund or assets against which it is drawn, and if unsustained by a consideration, is simply a request or order, that may be recalled at pleasure. It cannot, therefore, be effectual as a gift unless the payee obtains the money, or it is transferred to his credit during the drawer's life, and before payment is stopped or countermanded; *Greenfield's Estate*, 12 Harris, 232; *Harris v. Clark*, 2 Barb. 94; 3 Comstock, 93; *Winter v. Drury*, 1 Selden, 525. A draft on a particular fund confers an equitable right on the drawee to so much of the fund as is covered by the draft; post, vol. 2, notes to *Ryall v. Rowles*; and may consequently enure as a gift; *Pope v. Hatch*, 14 California, 403. It has been said that a check on a bank by a depositor is in effect, if not in form, a request to pay, not generally, but out of the funds held by the drawee; and in *Fogerties v. The Bank*, 12 Richardson, the holder of such a check was held entitled to maintain assumpsit for money had and received, against the bank. If this conclusion is admissible, such a check may operate as an equitable assignment, and consequently as a *donatio causâ mortis*. The law

was so held in *Butts v. Ellis*, 1 Beavan, 121; 4 De Gex, M. & G. 249; which was cited and approved in *Gourley v. Leisenbigler*, 1 P. F. Smith, 345; and *Rhodes v. Childs*, 14 Id. 18; although the point was not actually presented for adjudication. And when the question arose in *Chapman v. White*, 2 Selden, 412, the court held that a check on a banker is not distinguishable, either as it regarded form or effect, from a bill of exchange. Unaccepted it does not oppose any obligation on the drawee, and it is a *nudum pactum* as it regarded the drawer, unless sustained by a consideration. It is, therefore, necessarily inoperative and void as a gift.

[In general, equity does not aid a voluntary transfer, but leaves the donee to make out his case as best he may at law; *ante*, 420; *Taylor v. Staples*, 8 Rhode Island, 170. It is a logical consequence that a security for a debt cannot be given unless negotiable and payable to bearer, or drawn to the order of the donor and payable to him. Donations *mortis causâ* are confessedly exceptions to this rule. In *Harris v. Clark*, 2 Barbour, 94, 98, Gridley, J., said: "It is now settled by adjudged cases, that promissory notes, and bills of exchange, whether payable to order or not, and whether indorsed or not, bonds and mortgages, and all instruments in writing, by which any debt against a third person is secured, may be the subjects of a *donatio causâ mortis*. In the case of *Duffield v. Elwes*, (1 Bligh, N. S. 497,) Lord Eldon,

in a very elaborate judgment, in which he reviewed all the previous cases, came to the conclusion that a mortgage deed was the subject of transfer by mere delivery, as a *donatio mortis causâ*; reversing the decree of the Master of the Rolls, who had held the contrary doctrine. The principle established in this case is, that in the case of the gift of a bond or mortgage, there is a trust raised which a court of equity will enforce, by compelling the executors to allow the use of their names in any legal proceeding necessary to enforce the security against the debtor, for the purpose of carrying into effect the intention of the donor. In this respect there is a manifest distinction between a gift *inter vivos*, and a *donatio mortis causâ*. In the former case a court of equity will not compel a donor to complete his gift, nor an executor to complete the gift of his testator; whereas, as we have seen, in the latter case, the donor may successfully invoke the aid of the Court of Chancery for that purpose."

The distinction is now generally disregarded, and the delivery, by way of gift, of a bond or of a note drawn to order and unendorsed, held to confer a right of property which equity will uphold by empowering the donee to sue in the name of the donor, and precluding the latter and his legal representatives from claiming the proceeds when recovered; *Camp's Appeal*, 36 Conn. 88; *Sessions v. Mosely*, 4 Cushing, 87. The right to the amount standing to the donor's

credit in a saving fund or trust company, may consequently pass by the delivery of the bank or pass-book with an intent to give; *Camp's Appeal*; and so when a certificate of stock is handed over without being transferred on the books; *ante*, 440.

It seems that land cannot be given *mortis causâ*; *Meacham v. Meacham*, 24 Vermont, 49; and it was held in this instance, that a conveyance by a husband to his wife in his last illness, was invalid as an absolute gift, as leaving him without any sufficient means of support, and could not be supported as a donation *causâ mortis*, *ante*. A bond and mortgage may nevertheless pass by a donation *causâ mortis*, because the debt is the principal, and the mortgage a mere collateral; *Chase v. Redding*, 13 Gray, 416; *Mitchell v. Pease*, 7 Cushing, 350. And a conditional grant of real estate in the nature of a gift *causâ mortis* may unquestionably be made by an instrument under seal, properly drawn for such a purpose.

The power of a married woman to make a donation *mortis causâ*, rises no higher than that to bequeath by will; and the gift, con-

sequently, will not be valid without the consent of the husband, which must be shown affirmatively; *Jones v. Brown*, 34 New Hampshire, 439. See *Bourne v. Fossbrok*, 18 C. B. N. S. 528.

It was said in *Headley v. Kirby*, 6 Harris, 326, that a gift purporting to pass all the donor's property, in view of the approach of death, was, in effect, a will, and consequently invalid, unless reduced to writing, and executed as the law requires. It could not, therefore, be sustained as a donation *mortis causâ*. The true ground of the decision seems to have been that the words of gift were general, and that the property was not handed over to the donee. It is difficult to believe that a gift by a dying man, will fail because it is his all; and there can be little doubt that one may dispose of the whole of his personal estate by distributing it among the persons whom he desires to benefit. In *Meacham v. Meacham*, 24 Vermont, 591, a deed of all the giver's real and personal property was accordingly said to be a good *donatio mortis causâ* of the personalty, although it did not pass the title to the land.]

INDEX

TO THE NOTES, ENGLISH AND AMERICAN.

THE NUMBERS REFER TO THE PAGING OF THE AMERICAN EDITION.

ACQUIESCENCE, 57, 98, 236, 257, 258, 417, 622, 824, 1011.

See APPLICATION OF PURCHASE-MONEY—CATCHING BARGAINS—CONSTRUCTIVE TRUSTS—ELECTION—FRAUD ON MARITAL RIGHTS—TRUSTEE—WASTE.

ADMINISTRATOR. *See* EXECUTOR—APPLICATION OF PURCHASE-MONEY, 2.

ADVANCEMENT.

Presumption of, arises on a purchase by a parent, in the name of his child, 325, 344.

Or by a person *in loco parentis*, ib.

Or by a husband in the name of his wife, ib.

Presumption of, does not arise on purchase in name of woman cohabiting with purchaser, 325.

Nor between brothers, 344, 345.

Whether it arises on a purchase by a married woman, 325.

By a widow, 326.

On contract to purchase land, ib.

Presumption arises in case of personal, as well as real, property, 327.

Stock purchased in name of wife or child, ib.

Or bond taken, ib.

May be rebutted by evidence, that the purpose was a trust for the purchaser, and not an advancement to the grantee, 344, 345.

But presumption of advancement cannot be rebutted by proof of a purpose in fraud of, or contrary to, law, 345.

Distinction between the admission of evidence to rebut and to fortify equitable presumption, 347.

The infancy of a child is not a circumstance which rebuts the presumption of advancement, 327.

Nor the circumstance that the property is reversionary, ib.

Nor that it is a purchase in the joint names of father and son, 328.

On a purchase in joint names of child and stranger moiety only results, ib.

On a grant of copyholds in the name of father and sons successive, ib.

Son may, in some instances, be trustee where he is fully advanced, ib.

Aliter, if advanced but in part, 329.

Child having reversionary estate only, not considered as advanced, ib.

Father's entering into possession, and taking rents and profits, or giving receipts in son's name, if an *infant*, does not rebut presumption, ib.

Such acts said by some to be referable to acts of guardianship, ib.

By Lord Nottingham, to presumptive advancement, ib.

And will not rebut presumption, even where son is adult, if son is advanced but in part, ib.

But they may, if he is fully advanced, 330.

ADVANCEMENT, continued.

Presumption may be rebutted by evidence of facts showing father's intention that son should be trustee, 330, 346.

But such declarations must be made contemporaneously with the purchase, or be so immediately connected with it as to form part of the same transaction, ib.

Subsequent facts not admissible as evidence of intention, 331, 346.

As a devise, *ib.*

Or mortgage, 331.

Or demise of copyholds, *ib.*

Unless where the license to lease is obtained, or a surrender to the use of the will is made at the same Court as the grant, *ib.*

Presumption may be rebutted by parol declarations of father, made contemporaneously with the purchase, *ib.*

Semble, evidence of husband and wife as to contemporaneous intention of husband admissible some years after, on a purchase made in the names of husband, wife, and child, 332.

Presumption of advancement of wife may be rebutted by evidence of an opposite intention. 332, 345.

Evidence of parol declarations not admissible, if made subsequently to purchase, 332.

A fortiori evidence may be given of father's intention to advance son, *ib.*

But *subsequent* acts and declarations of the father may be used by the son against him, *ib.*

And *semble*, those of the son may be used against him by the father, *ib.*

Evidence not admissible to rebut advancement by showing purchase to be made in fraud of the law, 332.

Presumption of advancement of wife rebutted, *ib.*

Unpaid purchase-money, in case of advancement, a debt from father's assets, 333.

When void against creditors, *ib.*

Purchase by one largely indebted, in the name of a wife or child, void as against creditors, and will be applied by equity for their benefit, whether meant as a trust for himself or an advancement to the grantee, 324, 343, 345.

Presumption of, does not arise when son acts as solicitor of parent, 333.

Court may repudiate shares transferred by a father to his infant son, 333.

See **RESULTING TRUST**.

ADVANCES. See MORTGAGE.**AGENT.**

A person employed to act as agent for another, cannot use the power conferred by his position as a means of making a benefit for himself, out of, or in the course of the business of his principal, 72, 73, 220, 250, 251, 253, 260, 261, 360.

Agent employed to procure or renew lease, or to act generally on behalf of principal, cannot procure or renew it for his own benefit, 54, 72, 73, 249, 263, 360.

Partners, stock-brokers, attorneys, and all other persons, who have bound themselves, or who are expressly or impliedly bound to act for the benefit of others, fall within this principle, 53, 54, 66, 72, 221, 250-253, 260.

Effect of renewal of lease or purchase of reversion by one of the partners, for his own benefit, 53, 54.

Cannot renew lease for his own benefit, 56, 219.

Trustee cannot purchase trust estate for another as, 214, 239.

Agent employed to sell cannot purchase the trust estate, 214, 238, 250.

Nature of sale immaterial, 263.

Employed to sell, cannot purchase from his principal, 219, 238, 250, 260.

Unless he furnish him with all the knowledge he himself possessed, *ib.*

A fortiori, purchase made in another's name, will be bad, *ib.*

Nor is it necessary to prove that the purchase was at an undervalue, 219, 240.

AGENT, continued.

And if he be employed to purchase or take a lease, he shall not take it for his benefit, *ib.*

The onus of proof lying on the agent, and not on the principal. 260.

So, when purchase is made under cover of name of another, or attended by other circumstances of fraud on, or concealment from, the principal, 220, 255.

Agent employed to settle a debt, cannot purchase it for himself, 220.

Agent or attorney, employed to collect a debt by legal process, cannot purchase property of debtor, at a sale under an execution, for less than the amount of the debt. 251.

And it is immaterial that the agent is also a judgment creditor of his principal. 251.

Agent who is surety for debt for which sale is made, may purchase, subject to right of principal to redeem on tendering indemnity. 251.

Purchase by agent, of land which he has been employed to buy, will give rise to a trust for principal, if the agency is proved by writing, and even when it is not, if the transaction is a fraud on the principal. 261, 262, 263.

Agent employed to purchase, not permitted to profit by a sale to his principal, 220.

Except by express consent, *ib.*

Case of partner employed by firm to purchase, selling his own goods, 221.

Co-owner acting as ship's husband, *ib.*

Agent of colliery, *ib.*

Stockbroker, *ib.*

Agent or steward may take lease from his principal or employer, 225.

But full information must have been given, *ib.*

Agent employed to pay taxes cannot purchase at tax sale, 249.

Fraudulent purchase by, voidable, not void. 835.

Confirmation of purchase, by principal. 257, 258, 259.

Bill filed to prevent improper dealings with cargoes by agents.

Husband may be agent of his wife, 758.

See CONSTRUCTIVE TRUSTS—TRUSTEE.

AGREEMENT. *See CONTRACT—PAROL AGREEMENT—PART PERFORMANCE OF AGREEMENT—SPECIFIC PERFORMANCE OF AGREEMENT—STATUTE OF FRAUDS—VOLUNTARY DEEDS AND CONTRACTS.*

ALIEN.

When resulting trust not enforced in favor of, 343.

ALIENATION.

Restraint upon, of married woman. *See SEPARATE USE.*

ANNUITANT.

Cannot purchase estate upon which annuity is charged, 215.

APPLICATION OF PURCHASE MONEY.

Modification of doctrine by various statutes, 78, 79, 114, 118.

1. As to purchasers of real estate, 79.

Purchaser bound to see to application, when debts, legacies or annuities are specified, 79, 114, 115.

But not when there is a trust for the payment of debts generally, 80, 112.

Or a devise for the payment of legacies, 113.

Or a general charge of debts, 80, 112.

Although debts exist, 118.

Although there be a trust or charge for payment of legacies or annuities, 80, 81, 113.

Or mention is made of a particular debt, 82.

Unless purchase money is misapplied with co-operation of purchaser, 90, 114.

Or purchaser has notice of intended misapplication. 114, 119.

How far charge of debts authorizes sale of real estate, 100–109.

APPLICATION OF PURCHASE MONEY, *continued*.

- Purchaser not liable, even after payment of debts, according to *Johnson v. Kennet and Forbes v. Peacock*, 82, 84.
- Remarks of Lord St. Leonards on these cases, 84, 85.
- Liability of estates to debts by statute, does not absolve purchaser from seeing to payment of legacies charged thereon, 85.
- Whether the law would be so held in this country. quære*, 113.
- Purchaser not liable to see to, even where no trust for general payment of debts, if trusts for sale are immediate, and the cestui que trusts are not ascertained, or not of age, 86.
- Nor where purchase money is to be applied upon trusts requiring care and discretion, 87, 116, 118.
- As where money is to be re-invested*, 116, 117, 118.
- Nor where authority is given to invest, 87, 116, 118.
- Nor where charge for payment of debts is followed by specific dispositions of real estate, 88, 89.
- Purchaser not bound to see how much land is necessary to be sold for payment of debts, 89.
- Nor, where the trust is for payment of such debts as personalty is deficient in paying, to see whether land is wanted, *ib*.
- Secus*, where there is a mere power to raise money on a deficiency of personalty, *ib*.
- Purchaser under decree of court not liable*, 114.
- With notice of judgments, 90.
- Liable when a party to a breach of trust, 90, 114.
- As when trustee is selling to pay his own debt, 90.
- Mortgagee's security, how invalidated, when trustees raise money by unauthorized mortgage, 90, 91.
- After considerable time after testator's death, 92.
- Purchaser with notice of administration suit having been instituted, *ib*.
- How far trustees not having power to give receipts, can by conditions of sale compel purchasers to be satisfied with their receipts, 92, 93.
- Payment of money into court under Trustee Relief Act, 93.
2. As to purchasers of personal property from executors or administrators, 93.
- Purchaser or mortgagee of leaseholds or other personalty from executors, or administrators, not liable to see to, 93, 110.
- Unless there is want of valuable consideration, or ground for inferring mala fides*, 110, 111.
- When fraud will be presumed*, 111.
- Sale or mortgage good against residuary, pecuniary, and specific legatees and creditors, *ib*.
- Notwithstanding notice to the purchaser or mortgagee of the will or bequest, *ib*.
- Or that money was originally advanced to executors on their personal security, 94.
- Executor or administrator mortgaging leaseholds may give power of sale, *ib*.
- So likewise trustees with express power to mortgage, 95.
- Power not imported by Court into absolute conveyance held to be only a security, *ib*.
- Power authorized by Court on mortgage of an infant's estates, *ib*.
- Executor may give mortgagee of debts power of attorney, *ib*.
- Concurrence of specific legatee in sale of chattels desirable, *ib*.
- Unless he is executor, *ib*.
- Purchaser from devisee to whom property has been conveyed by persons entitled to sell under general charge of debts, not bound to see to, 96.
- Purchaser bound to see to where personal estate clothed with particular trust, *quære*, *ib*.
- Purchaser or mortgagee liable in cases of fraud, *ib*.
- As where executor mortgages or sells, to pay or secure his own debt, 96, 97.
- But *quære* where the executor is specific and residuary legatee, 98.
- Unless purchaser or mortgagee is aware that testator's debts are unpaid, *ib*.
- Purchaser bound to see to, where executor has sold at an undervalue, *ib*.

APPLICATION OF PURCHASE MONEY. *continued.*

Or to one who knew that there were no debts, or that all debts were paid, *ib.*
 Creditors and legatees barred from proceeding against purchaser, by length of time and acquiescence, *ib.*

Legatees barred although their legacies are contingent, *ib.*

Pecuniary or residuary legatee can follow assets as well as creditors and specific legatees, 99.

Banker not bound to see to application of money paid to executor on his cheque, *ib.*

Unless he had notice of an intended fraud, *ib.*

The inclination of the cases in this country seems to be, that a purchaser from trustees is not bound to see to the application of the money, unless the sale be a breach of trust, or fraud, and the circumstances are such as to give the purchaser express or implied notice, in which cases the trust will follow the property into the hands of the purchaser, 109.

Application of this principle.

1. *Sales of chattels by executors, guardians or trustees, 110.*
2. *Sales of land under a power to sell for debts and legacies, 112.*
3. *Sales under a power in a settlement to sell and re-invest, 116.*
4. *Sales by surviving partner, of real estate of firm, 111.*

See CHARGE OF DEBTS.

APPOINTMENTS.

Defective, when aided, 366. *See DEFECTIVE EXECUTION OF A POWER—FRAUD UPON A POWER—ILLUSORY APPOINTMENT.*

ARBITRATOR.

Cannot purchase claims of parties to the reference, 230.

Specific performance of agreement to refer to, 1106.

ASSIGNEES OF A BANKRUPT.

Cannot purchase his property, 225.

Nor can assignee's partner, *ib.*

Semble, not even with the consent of the majority of the creditors, *ib.*

Nor can the assignees purchase up the debts of the bankrupt for their own benefit, 226.

But purchase may be confirmed by the court, if beneficial, *ib.*

When removed in order to bid, 202.

When order to bid refused, allowed to name price, *ib.*

See COMMISSIONER OF BANKRUPTCY—SOLICITOR.

ASSIGNEES FOR THE BENEFIT OF CREDITORS.

Cannot purchase at their own sale, 249.

Nor at a sale of the property under legal process, *ib.*

Nor can an agent of the assignee, *ib.*

Nor can a commissioner appointed by the Orphans' Court to sell land, 250.

ASSIGNMENTS.

When assignments which fail at law will be sustained in equity, 395-414, 438-442.

Of chose in action, when specific performance of, decreed, 1105.

ATTORNEY AND COUNSELLOR AT LAW.

An attorney or counsellor at law, consulted as to the title of land, cannot, for his own benefit, buy an outstanding adverse title, 73, 360.

An attorney in an execution cannot purchase for himself, at a price insufficient to pay his client's debt, 251.

*And an attorney for two or more cannot purchase for one exclusively, *ib.**

An attorney cannot use knowledge obtained in acting for his client, to the disadvantage of the latter, 251, 252.

*And when an attorney buys from or sells to his client, the onus of proving the fairness of the transaction lies on the attorney, *ib.* See SOLICITOR.*

AWARD.

When specific performance of, decreed, 1105.

BANK.

When deposit in name of third person creates valid trust, 422, 433.

See DONATIO MORTIS CAUSA—VOLUNTARY DEEDS AND CONTRACTS.

BANKER.

Not bound to see to application of money paid to executor on his cheque, 99.

Unless paid with notice of intended misapplication, ib.

BANKRUPT. See CONVERSION.**BARRISTER.**

Consulted as to compromise of debt, not allowed to purchase it for his own benefit, 228, 229.

See ATTORNEY—SOLICITOR.

BILL OF EXCHANGE. See SUBROGATION—SURETY.**BISHOP.**

When disqualified from taking grant of annuity raised for building a rectory, 230.

BOND.

Want of consideration no defence to, 444.

Of married women, when binding, 758, 764.

See PRINCIPAL AND SURETY—SEPARATE USE—SURETY.

CARGOES.

Bills filed to prevent improper dealings with, by agents, 1112.

CATCHING BARGAINS.

With heirs, reversioners, or expectants (not coming within 31 & 32 Vict. c. 4), set aside for mere inadequacy of price, 809, 810, 826.

Though mere inadequacy not sufficient to set aside sales of interest in possession, 810.

Unless there be fraud, surprise, or misrepresentation, ib.

Or the inadequacy of price so great as to be evidence of fraud, 810, 825.

Inadequacy of price ground for rescinding contract respecting expectancies, 810, 828.

Or reversionary interests, ib.

Rule on this point in the United States, 828.

Immaterial that expectant heir is of mature age, 811.

Or that he understood transaction, ib.

Not necessary to show that he was in pecuniary distress, ib.

Some principles applicable to grant of reversionary lease, ib.

Reversioner need not combine character of heir, ib.

As a general rule onus lies upon a person dealing with a reversioner or expectant, of proving that the transaction was reasonable, and the price adequate, 811, 829.

History and policy of the doctrine, 811, 826.

Grounds for setting aside such dealings, 812, 826.

With a mere expectant, dealing with strangers for his expectancy, a fraud is committed on the ancestor by, 812, 829.

Reversioner may set aside transaction, notwithstanding a resale, when, ib.

But a fair agreement between expectants or heirs, to divide property will be enforced, 813, 829.

Rule as to sales of reversion is applicable, though a small part of the property sold is in possession, 814.

Especially if thrown in colorably, ib.

Reversionary interests depending on marriage and birth of issue, capable of valuation, ib.

Contingency, if remote, will not be taken into consideration in estimating the value of the reversion, 598.

Exception from rule, when vendor has stated in his proposals the value of the property, 815.

Relief will be given, especially in the case of a young heir, against usurious loans under the mask of trading, ib.

CATCHING BARGAINS, continued.

- But, *quære*, when the transaction is known to the father or person from whom the spes successionis is entertained, 815, 816.
- Or if the situation of the other party or his property is altered, *ib.*
- Judgment of Lord Brougham in *King v. Hamlet*, *ib.*
- Remarks of Lord St. Leonards thereon, 817.
- Rules of equity as to dealings with expectant heirs not altered by repeal of the usury laws, 817.
- Nor by the Sales of Reversions Act, 817, 818.
- Dealings between a father and son not considered as a reversionary bargain, and are unimpeachable, 819, 829.
- Unless there be undue influence on the part of the parent, *ib.*
- Settlement by heir on his wife and children valid, *ib.*
- So a sale of a reversionary interest by auction is in general unimpeachable, *ib.*
- Unless it be conducted improperly, as where sale is without reserve, 820.
- Sale may be supported where vendor and purchaser concur in ascertaining value from skilled persons, *ib.*
- Or for the highest bid when resold at an auction, *ib.*
- Secus* where opinion of actuary only is obtained, 821.
- But purchase by private contract set aside, though assigned by same deed, and with lot purchased at auction, *ib.*
- Rule as to sale of reversions not applicable to a sale by a reversioner and a person having the prior interest, *ib.*
- Not set aside where transaction reasonable, *ib.*
- No rule as to what constitutes inadequacy of price, *ib.*
- Reversionary interest valued by the market price not by the tables, 822.
- Gowland v. De Faria*, commented on by Lord Cottenham in *Lord Aldborough v. Trye*, 822, 823, 824.
- Calculated with reference to the time of the contract, not the result, 824.
- Circumstance that property is subject to a chancery suit must be considered, 824.
- And costs of selling real estate, *ib.*
- Terms upon which sale will be set aside, *ib.*
- Confirmation and acquiescence. effect of, 825.
- Confirmation of contract vitiated by fraud*, 828-836.
- Contract cannot be repudiated and property retained*, 831, 832.
- Unless entirely worthless*, *ib.*
- When party defrauded, must elect between affirmation and repudiation of contract*, 832-836.
- Remedies of party defrauded*, 833-836.

CHARGE OF DEBTS.

- How far it authorizes sale of real estate by executors, 100-106.
- Or devisees, 106, 107.
- Concurrence of executors not required where period for sale under express trust has arrived, *ib.*
- Alteration of the law by, 22 & 23 Vict. c. 35, 107, 108.
- What constitutes, 109.

CHARITIES.

- Defective execution of power, aided in favor of, 367.

CHATTELS.

- Specific delivery up of, when of peculiar value, 1111, 1114.
- Heirlooms, *ib.*
- Bill may be filed by pawnee, without making the pawner a party, *ib.*
- Where there is a fiduciary relation between the parties, it is not necessary that chattels should be of any peculiar value, 1112, 1117.
- Bills may be filed by owners of cargoes, to prevent improper dealings of agents, or persons in the situation of agents, *ib.*
- Or persons in the situations of agents, 1113.
- Deeds or writings, specific delivery of, 1113, 1116.
- When invalidated by fraud or mistake*, 1117.

CHATELS, continued.

Bill for delivery of certificate of registry of ship, *ib.*

When constructive delivery of, sufficient to support gift. See **DONATIO MORTIS CAUSA.**

Jurisdiction of common law courts to compel return of, 1113, 1116.

Measure of damages for non-delivery of, 1114

No lien for purchase money after sale and delivery of, 502.

Specific delivery of slaves, 1100, 1105.

Settlement of. See **EXECUTED AND EXECUTORY TRUSTS—SPECIFIC PERFORMANCE OF AGREEMENT.**

CHEQUE.

Banker not bound to see to application of money paid on cheque of executor, 99.

Unless paid with notice of intended fraud, *ib.*

See **DONATIO MORTIS CAUSA—GIFT.**

CHILDREN.

Construction of word when used in marriage articles, 17.

When voluntary agreement by parent enforced in favor of, 427.

CHOSE IN ACTION.

When voluntary gift of, will be enforced, 401, 405, 437-443.

See **VOLUNTARY DEEDS AND CONTRACTS.**

COMMISSIONER IN BANKRUPTCY.

Cannot purchase property of bankrupt, 227.

COMMISSIONERS UNDER INCLOSURE ACTS.

Incapacity from purchasing, what, 232.

COMPENSATION.

Persons disappointed by election, entitled to, 510, 511.

See **ELECTION.**

CONFIRMATION, 237, 257, 258, 824, 830.

See **CATCHING BARGAINS—FRAUD ON MARITAL RIGHTS—TRUSTEE.**

CONSIDERATION.

See **PART PERFORMANCE OF AGREEMENT—SURETY.**

CONSTRUCTIVE TRUSTS.

On a renewal of a lease by a trustee, guardian, executor, executor de son tort, or other person acting in a fiduciary capacity, in his own name, trust arises, for the person entitled to the old lease, 49, 62, 63, 64.

Though lessor refuse to renew to cestui que trust, 49, 63.

Not applicable to additional lands, *ib.*

And on a renewal by person having limited interest, as tenant for life, for those in remainder, 49.

Although original lease may have expired before the tenancy for life vested, *ib.*

Or tenant for life is author of settlement, 51.

Or there is a special provision that a particular renewal shall enure for benefit of trust, 51.

Attach to money paid to tenant for life for withdrawing opposition to a bill *ib.*

On renewal, although tenant for life has general power of appointment, 52.

Case of tenant for life obtaining the fee under an Act of Parliament, 52.

And on renewal by one of several persons jointly interested, for the others, 53.

By a person jointly interested with an infant, 53.

Or by one partner of premises bought or used for business of firm, 53, 72.

And on renewal by a mortgagee for the mortgagor, 55.

Though lease expire before renewal, *ib.*

And on renewal by the lessee for the mortgagee, legatees, annuitants, and incumbrancers, 56.

CONSTRUCTIVE TRUSTS, continued.

- Though lease fraudulently forfeited before renewal, *ib.*
 Money arising from the sale of right of renewal affected by the same trusts as leaseholds, if renewed, *ib.*
 Agent cannot renew for his own benefit, *ib.*
 Terms upon which an assignment by the trustee or tenant for life will be directed, 56, 57.
 Remedies against volunteers claiming renewed lease, 57.
 Or purchasers with notice, *ib.*
 Cestui que trust bound by acquiescence and lapse of time, 58.
 Tenant for life entitled to sum accumulated for renewal, when, *ib.*
 Purchase of reversion in leaseholds by sureties when not sanctioned by the Court, 59.
 Purchase of the reversion by trustee or tenant for life, 60.
 of equity of redemption by executor of mortgagee, *ib.*
 Quasi tenant in tail of leaseholds may renew for his own benefit, *ib.*
 Old tenant has no equity against a stranger obtaining a lease,
 Nor has a lessee against his sub-lessee, 61.
 Rights of a sub-lessee with covenant to renew at fixed rent against lessee renewing, *ib.*
 Or purchasing the reversion, *ib.*
 Against lessee obtaining renewal, fraudulently omitting provisions in the old lease, 62.
Purchase by partner of reversion of lease held by firm, 54, 72.
Partner selling property of firm and purchasing it, holds in trust for firm, 66, 72.
A purchase by a trustee of claims or incumbrances against the estate, at a discount, enures to the benefit of the cestui que trust, 65.
But the trustee shall be reimbursed with interest, 65, 836.
*The same rule applies where the trustee buys in an adverse title to the estate, *ib.**
Aliter in Pennsylvania in case of purchase at sheriff's sale in fraud of agreement with the defendant in execution, 836.
So of purchases made by directors for their own advantage, 65.
Promoters of companies cannot purchase at one price and sell to their associates at another, 66, 68.
And a prospectus which misleads is a fraud, 66.
But this disability does not attach until the fiduciary relation is established, 67.
Joint-tenants and co-parceners, and tenants in common under the same instrument or act, are trustees for one another for the protection of the common interest, and a purchase by one of an outstanding title or encumbrance, will give rise to a trust for all, 68, 69, 70.
So a widow in possession under her deceased husband is precluded from purchasing outstanding title to the prejudice of the heirs, 70.
So of purchases by one co-tenant of property sold under execution issued against both, 70, 71.
On a purchase of an encumbrance or outstanding title, by a tenant for life, a trust arises for the remainderman or reversioner, 71.
*And on such a purchase by a husband, having a life estate in the wife's land for the wife and her heirs, *ib.**
*And for the vendor, on the purchase of an adverse title by the vendee in possession before the conveyance, *ib.**
So of mortgagor and mortgagee, 71.
Same principle governs right of landlord to acquisitions made by tenant, 72.
An agent cannot deal for his own benefit in the subject of the agency, 72, 73.
Nor can the clerk of such agent, 73.
*An attorney or counsellor, who has been consulted professionally about the deed to land, cannot buy an adverse title for his own benefit: his purchase shall be in trust for his client, *ib.**
Purchase or conveyance to one man in fraud of another, will give rise to a trust for the latter, 336. See AGENT—CATCHING BARGAINS.

CONTINGENT REMAINDERS.

Limitations to, when inserted in the case of executory trusts, 26.
 Utility of trustees to preserve, 987. *See* WASTE.

CONTRACT.

When set aside, 826, 827.
Confirmation of fraudulent, 830-836.
When subject matter must be returned on repudiation of, 831.
When election must be made between affirmation or repudiation of, 832-836.
Remedies of party defrauded, 833-835.
 Of married women, *See* SEPARATE USE.—*See* PAROL AGREEMENT.

CONTRIBUTION.

Towards payment of fines on renewals, 57.
 Between sureties, 124. *See* SURETIES.
 Between specific legatees and residuary devisees, 915.

CONVERSION.

Doctrine of constructive, as stated by Sir Thos. Sewell, 1122.
Conversion from the death of the testator, or the date of the agreement, 1159
 1160.

1. *Money into land*, *See* RESULTING TRUSTS.

Money agreed or directed to be laid out in land is real assets, 1124, 1158,
 1162.

Subject to tenancy by the curtesy, 1124.

And *semble* to dower, since the Dower Act, but not previously, *ib.*

Passes under a general devise of lands, *ib.*

But not by a general bequest, *ib.*

Though it will be a bequest of so much money to be laid out in land, 1125.

Even previous to Wills Act, would not have passed by the will of an infant, *ib.*

Descends to the heir, *ib.*

Except where the money is at home, 1126, 1127.

When undisposed of surplus, results to next of kin, *See* RESULTING TRUST, 2.

Does not, as between real and personal representative, depend upon actual
 state of property, 1127.

Remarks upon *Walker v. Deane*, *ib.*

Money notionally converted into land, not liable to succession duty, 1128.

Liable to legacy duty, *ib.*

Will not escheat to the crown on failure of heirs, 785.

Money impressed with the character of realty, not forfeited to crown on con-
 viction of owner for felony, 1129.

Money to be laid out in land to go with settled property, may be expended
 in improving it, when, *ib.*

2. Land agreed or directed to be sold, considered as money, 1129, 1157, 1158,
 1160. *See* RESULTING TRUSTS, 2.

Though period prescribed for sale is remote, 1159.

Passes by a residuary bequest, *ib.*

And on intestacy goes to personal representatives, 1129, 1158, 1160.

And is not bound by the lien of a judgment, 1161.

When it descends to heirs, *See* RESULTING TRUSTS, 2.

Who may maintain bill for specific performance, 1129.

In the case of contracts with railway and other companies, what will amount
 to, 1129, 1132.

Heirs of purchasers of realty entitled to have purchase money paid out of
 personalty, 1132.

They must show a binding contract, 1132.

Takes place when heir at law of vendor adopts parol contract to sell land,
 1132, 1161.

Secus, if he acted by mistake, 1133.

*Direction to sell for convenience of distribution, is absolute conversion as long
 as object of division exists*, 1202.

Not arrested by incapacity of some of the objects to take, *ib.*

CONVERSION, continued.

Where the direction to sell is peremptory, but the time of sale discretionary, conversion takes place, 1159, 1164, 1165.

Conversion may be effected by agreement to sell or a conveyance to trustees for sale, 1160, 1161.

Though sale made dependent on the option of third persons, 1140, 1162.

Or of the purchaser, if the contract be in all other respects absolutely binding on the vendor, 1162.

Really converted into personalty by contract of sale may be reconverted by failure of vendee to pay purchase money, 1171.

Subject to all intervening rights, ib.

Devisee cannot now compel payment of purchase money by personal representatives of the purchaser, 1133.

Heir at law may, ib.

Does not take place on contract by trustee to purchase trust property, 1133.

A lien may take money arising for land, devised to be sold, 1133, 1157, 1161.

Secus, where there is no trust for absolute conversion, 1134.

May now hold lands under naturalization act, 1870, ib.

On failure of purposes of conversion on death of testator without heirs the lord cannot claim by escheat against the trustees for sale, ib.

*Nor can the Crown call for conversion that it might take the money as *bona vacantia*, ib.*

The Court will execute a trust of lands for an alien in favor of the Crown, when, 1134.

Doctrine of, will not give jurisdiction to Probate Court over a will limited to real property, ib.

3. Must be imperative, 1134, 1162.

If it be optional, as to invest in purchase of lands, or on securities, conversion will not take place, 1135.

Nor where trustees have mere power, with consent of others, to purchase land, ib.

Nor where money is to be laid out in the purchase of land in fee simple or for terms of years with consent of others, "and not without," 1136.

But although apparently optional, it may be considered imperative where limitations are adapted only to real estates, ib.

Provido that if party interested should elect to take land as realty does not prevent conversion, if it would otherwise occur, 1163.

Or where the words of request are merely inserted for the purpose of enforcing the obligation to convert, 1137.

Secus, where words of request are inserted for purpose of making purchase discretionary, ib.

Where the power to convert for the benefit of a class is discretionary, the respective estates must be taken as they are found, ib.

Secus, where the power is imperative, and in the nature of a trust, 1138.

Of land into money may be implied, ib.

But intention must be clear, ib.

Where direction to convert is imperative, legacy duty is payable, ib.

Even though person entitled elects to take the land, ib.

Secus, where direction is discretionary, and trustees do not sell, 1138, 1162, 1163.

But it may if trustees do sell, ib.

Doubtful whether liability to duty should depend upon act of trustees, ib.

But it will not if sale takes place not under the power, but under jurisdiction of the Court, 1139.

Nor where trustees are directed to invest proceeds in the purchase of or on mortgage of other lands, ib.

A fortiori, if they are directed simply to re-invest in the purchase of lands, ib.

Probate duty not payable in respect of land absolutely directed by will to be converted, ib.

Nor where the direction to convert is by deed, when, ib.

And on part of purchase-money not received by testator, who had contracted to sell land, 1140.

CONVERSION, *continued.*

Since Succession Duty Act, question not of much importance, *ib.*

Legacy duty payable on real property purchased and used for partnership purposes, *when, ib.*

4. *As to period from which conversion takes place, ib.*

The delivery of a deed, *ib.*

The death of the testator, *ib.*

Though sale be directed whenever it should appear advantageous, *ib.*

May be made to depend on the option of third parties, 1140, 1162.

As the option to purchase at a future time, 1140, 1141, 1162.

And when purchase is made, conversion will relate back to time of sale, 1160, 1162.

In the mean time the rents and profits go to persons entitled up to that time to real estate, 1141.

Semble, a specific devise by name of the property, subject to the option, may carry to the devisee the purchase-money, 1142.

Whether legatee of personal estate has any remedy against a release of the option to purchase to the heir or devisee, *ib.*

Right of person entitled to option when land taken by company under compulsory powers, *ib.*

5. *By Court or third parties independently of contract or will, ib.*

Bankrupt's real estate will on his death intestate go to his heir, 855.

If sold or contracted to be sold in his lifetime, it will be converted, *ib.*

But not if sale or contract for sale take place after his death, *ib.*

Wrongful by trustees does not alter character of property, 1143.

By court of competent jurisdiction, *ib.*

In the case of a lunatic's property, *ib.*

Lunatic's estate for what purpose ordered to be sold, *ib.*

Or his timber felled, *ib.*

Is personal assets, *ib.*

Personal estate of lunatic when laid out on real estate, 1144,

For repairs, *ib.*

Renewals of leasehold, *ib.*

Admissions to copyholds, *ib.*

Or improvements on real estate, *ib.*

And outlays, *ib.*

Payment of mortgages, 1145.

Next of kin whether entitled to amount expended in exoneration, *ib.*

Court will not lightly alter estates, *ib.*

Or buy or sell estates, *ib.*

Committees cannot change property without leave, *ib.*

Timber on lunatic's estate cut tortiously by a stranger, *ib.*

As to surplus monies arising from the disposition of land belonging to lunatics, *ib.*

Power of Lord Chancellor over properties of small amount of lunatics not so found by inquisition, 1146.

Distinction between conversion of property of lunatics and infants, *ib.*

Conversion of one species of property of an infant into another, when allowed, 1146.

As to timber felled on real estate of an infant, 1147.

When infant is seized in tail, *ib.*

When in fee, *ib.*

Personal estate of infant when applied in payment of a mortgage considered as personal estate, *ib.*

Line of descent may be altered by renewal of lease for lives by guardian, *ib.*

Semble, distinction as to the conversion of property of lunatics and infants does not exist since the *Willis Act*, 1148.

Timber felled by order of Court during life estate is realty, 1148, 1149.

Until owner elect to take it as personalty, 1149.

Where sale of a mortgaged estate takes place under a power in the lifetime of the mortgagor, the surplus is personalty, *ib.*

Secus, where the sale takes place after his death, *ib.*

CONVERSION, continued.

Unless there be a trust of the proceeds of the sale for the executors and administrators of the mortgagor, 1150.

Surplus of real estate ordered to be sold by Court retains character of realty, *ib.*

Peculiarity of *Flanagan v. Flanagan*, *ib.*

As to land taken under the Lands Clauses Consolidation Acts, 1151.

Under local Acts, *ib.*

Election to take land or money in its actual state, *ib.* See **ELECTION**, 2.

6. Real estate purchased with partnership capital, for the purposes of partnership in trade, will be converted into personalty, 276.

But only so far as requisite for the purpose of the partnership, 1165, 1168. *Rule in the United States*, 292, 299, 300.

Question only arises when partnership is solvent, 297.

Secus, except by express agreement, where the real estate belonged to the partners, when they entered into partnership, 277, 278, 279.

Or has been acquired by their private monies, or by gift, although it has been used for partnership purposes in trade, *ib.*

Or when real estate is purchased by partners out of their partnership capital, but not for the purposes of partnership in trade, 280, 283.

But real estate converted as partnership property may be reconverted by agreement, 282, 283, 313.

Takes place for the purpose of subjecting land to probate and legacy duty, when, 283.

Result of authorities, *ib.*

Takes place when land is bought by partners or by joint stock or other association for purpose of resale, 283, 310, 312, 313.

Partners have a lien for advances in respect of the joint property, 284, 285.

But not mere joint owners, *ib.*

CONVEYANCE.

When set aside, 826, 828.

COPYHOLDS.

Surrender of, when supplied in equity, 366. See **DEFECTIVE EXECUTION OF A POWER—SURRENDER OF COPYHOLDS**.

COSTS.

When recoverable from principal by surety, 182.

When trustee or solicitor purchasing trust property is liable for, 235, 237.

COUNSEL.

When fees of, recoverable from principal by surety, 180, 183.

See **ATTORNEY—BARRISTER—SOLICITOR**.

CREDIT.

When married women entitled to benefit of purchases made upon, 758, 761, 763.

CREDITOR.

Where debtor has agreed to convey estate to creditor upon trust to pay debts, latter may purchase estate from agent of debtor, 231.

Purchasing collaterals sold by himself, holds them upon same trust as formerly, 245.

Defective execution of power aided in favor of, 367.

How far settlement made in consideration of wife's equity to a settlement, is binding against, 668, 678.

See **EQUITY TO A SETTLEMENT—PRINCIPAL AND SURETY—SURETIES—TACKING**.

CROSS REMAINDERS.

When inserted in settlements carrying marriage articles into effect, 16, 17.

Or directed in wills, 25.

CYPRES.

Doctrine of, as applicable to executory trusts, 29.

DEBTS.

When voluntary transfer of, enforced, 431.

Where purchaser is bound to see purchase-money applied in payment of. *See*

APPLICATION OF PURCHASE-MONEY.

Personal estate primarily liable to, unless exempted, 892. *See* EXEMPTION OF PERSONAL ESTATE FROM DEBTS—EXONERATION.

Antecedent debt, when and how far consideration for sale or transfer, 111.

DECLARATION OF NO OFFSET.

Effect of, 876-880.

DECREE.

Purchaser under, not bound to see to application of purchase-money, 114.

DEEDS.

When specific delivery to legal owner decreed, 1112.

When invalidated by fraud, 1117.

May be converted into mortgage by parol proof, 871.

See CHATTELS—DONATIO MORTIS CAUSA—EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS.

DEFECTIVE EXECUTION OF A POWER.

Power must be strictly pursued at law, or execution will be void, 380.

Aided in equity, and surrenders of copyholds to the use of will supplied, 366, 380, 382.

In favor of purchasers, 367, 381.

Mortgagees, 367.

Lessees, *ib*

Creditors, 367, 381.

Charities, 368.

Wife or legitimate child, although volunteers, 368, 381.

Or provided for, 369.

But not in favor of a husband, *ib*.

Natural child, *ib*.

Grandchild, 369, 381.

Father or mother, 369.

Brother or sister, *ib*.

Nephew or niece, *ib*.

Cousin, *ib*.

Settlor, *ib*.

Others, being volunteers, *ib*.

Semble, covenants by deed to surrender copyholds not aided on meritorious consideration, 366.

Defective appointment by a married woman aided, 369.

Defect will be supplied *against* remainderman, 370.

Heir, or customary heir, *ib*.

Whether against heir, being a son or grandson, totally unprovided for, *quære, ib*.

But it will be supplied as against collateral heir, without any provision, 371.

Equity relieves against defective execution where the intention to execute it appears by covenant, 371, 381.

As by a covenant, *ib*.

Desire in will, *ib*.

Agreement, *ib*.

Even though donee of power keeps possession of agreement, 371.

Promise by letter, *ib*.

Recital in a deed, *ib*.

Answer to a bill in Chancery, *ib*.

But not a parol contract as against a remainder-man, 372.

As a parol contract to grant a lease, *ib*.

Unless remainder-man suffers lessee to expend money on improvements, *ib*.

Equity also relieves, if deed or will is executed in the presence of a smaller number of witnesses than required by the power, *ib*.

Or if sealing is omitted, *ib*.

Will, of personal estate, *ib*.

DEFECTIVE EXECUTION OF A POWER, *continued.*

Will, of real estate, 372.

Will, if executed now according to stat. 1 Vict. c. 26, is a sufficient execution of power, *ib.*

Power aided, if executed by will, instead of deed, 373.

By married woman aided, except where formalities not observed were for her protection, *ib.*

As where copyholds to be appointed by will are surrendered by deed, 374.

Or there is a mere joint letter of husband and wife, instead of a writing attested by two witnesses, *ib.*

Appointment not made within time prescribed, *ib.*

Not aided, unless distinct intention to execute power shown, *ib.*

Sale of an estate by trustees not aided, when they sold estate without timber, 375.

Or on sale of land under power with reservation of minerals, 376.

Alteration of law by recent legislation, *ib.*

Will not relieve against defects of form if the donee would be deprived of the protection the due exercise of the power would afford, 374.

What powers aided, 377.

Power of leasing aided against remainder-man, *ib.*

Even in the case of a married woman, 378.

Remedies of lessees extended by the legislature, *ib.*

Defect not aided if execution of power would be a breach of trust, *ib.*

Or a fraud upon the power, *ib.*

Power of leasing not aided when rack rent not reserved, or fine not taken contrary to power, *ib.*

But rent must be so low as to afford evidence of fraud, *ib.*

Power of leasing not aided where unusual covenants are introduced, when, *ib.*

Agreement to lease without the consent of a person whose consent is requisite, not aided, *ib.*

To grant a lease before the time authorised, aided, when, *ib.*

A defect in the execution of power under an Act of Parliament, not aided, 379.

Non execution not aided, 379, 381.

Though disability arises from accident, as sudden death, or gout, 379.

Unless coupled with trust, 381.

Unless execution prevented by fraud, 379.

Defects in execution of powers cured by statute, *ib.*

Courts of Probate if will is valid, cannot see whether power is properly followed, *ib.*

Effect of Wills Act, 380. *See SURRENDER OF COPYHOLDS.*

Appointment by deed rendered valid by the Property and Trustees Relief Amendment Act, when, *ib.*

DELIVERY OF GIFT. *See DONATIO MORTIS CAUSA—GIFT—VOLUNTARY DEEDS AND CONTRACTS.***DEPOSIT OF TITLE DEEDS. *See EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS.*****DEVISEES.**

How far charge of debts authorizes sale of real estate by, 106, 107.

DIRECTION TO CONVEY.

Does not render trust executory, 14.

DIRECTOR.

Is prevented from dealing with company, 215, 241, 242.

As is a firm in which he is partner, 215.

Contracts of, under Joint Stock Companies Act, to be submitted to meeting, when, 232.

Purchases and contracts by, 65, 66, 67, 68.

When liable for lending the funds of the company to a co-director, 243.

Cannot purchase at his own sale, 241, 242.

See CONSTRUCTIVE TRUSTS.

DONATIO MORTIS CAUSA.

Doctrine of, derived from the civil law, 1219, 1221.

Explanation of the civil law, *ib.*

Doctrine of, not favored, 1231.

Evidence must be clear and satisfactory, 1228, 1231.

Uncorroborated testimony of donee insufficient, *ib.*

Especially where undue influence might have been used, *ib.*

Gift must be in contemplation of death, 1220, 1241, 1242, 1243.

To take complete effect only in case of the donor's death, *ib.*

Condition implied, if the donor is in the extremity of sickness, 1220, 1231.

But presumption excluded by proof of gift or donor's ignorance of his danger, 1232.

An immediate irrevocable gift bad as, 1221.

Of a check bad, 1221, 1224, 1249, 1250.

Legal transfer good, on condition express or implied that it is to take effect only in the event of the donor's death, 1232.

On recovery of the donor the donee will be a mere trustee, 1222, 1243.

Unless there be a confirmation of the gift, 1222.

Must be limited to personalty, 1251.

Cannot be made by feme covert, without consent of husband, *ib.*

May be of the whole of donor's property, *ib.*

There must be delivery to donee, 1222, 1233, 1243, 1244.

Or to the agent of donee, 1239.

Delivery may be made upon condition or trust, 1222, 1231, 1240, 1245.

To an agent, in the character of agent for the donor, is not sufficient, 1223.

Donor must part with dominion over gift by delivery, 1223, 1233.

Delivery after donor's death invalid, 1237, 1243.

Symbolical delivery, when valid, 1223, 1224, 1237, 1244.

Delivery may be according to nature and situation of property, 1244, 1246.

Of deed of gift, 1238, 1239, 1240.

Of mortgage deeds, 1225, 1226, 1250, 1251.

Delivery of receipts for South-Sea Stock, of a note not payable to bearer, or of a check, is insufficient, 1224.

Except where the note is given for a purpose which necessarily supposes the death of the donor, *ib.*

Delivery of the key of a trunk held sufficient delivery of it and its contents, 1224, 1244.

Keys of room, 1237.

Gift of a bond, note, or other written evidence of a debt due and payable by a third person, valid in this country, whether drawn or payable to the donee or donor, to order or bearer, 1246, 1247, 1250.

And in general of such certificates of stock or securities as are negotiable and capable of being passed by delivery, *ib.*

But not of a draft or note executed or payable by the donor, 1247.

Unaccepted bill of exchange or general draft inoperative as, 1249.

Draft on particular fund, *ib.*

Gift of a check under peculiar circumstances, held good in *Boutts v. Ellis*, 1224.

Delivery of a bond good, although an action may be maintained without proof, 1225.

And of bank-notes and notes payable to bearer, 1224, 1225.

Though not endorsed by donor, *ib.*

Of life policy, *ib.*

Growing crops, 1234.

Bank or pass book, 1244, 1237, 1251.

Deposit in bank, 1240.

When constructive delivery of chattels sufficient, 1235, 1237.

Donor retaining subject matter as trustee or custodian, 1235.

When subject matter is in hands of third parties, 1235, 1236.

And of a document which is essential to the recovery of a debt, 1226.

Where there is no delivery, there can be no donatio mortis causa, 1227.

Cannot be made by parol, *ib.*

DONATIO MORTIS CAUSA, continued.

Whether it can be made by writing, *quære*, 1228, 1233, 1237.

If donor's intention to vest property is set forth in writing, instrument must be delivered. 1233, 1234, 1237, 1238, 1245.

An issue will be directed when the donatio mortis causa is doubtful, 1229.

Burden of proof is on donee. 1241.

Donor's declarations will not supply actual transfer. *ib.*

But when donee is in possession, such declarations are evidence of gift. *ib.*

How a donatio mortis causa resembles, and how it differs from, a legacy and a gift inter vivos, 1229.

Donatio mortis causa will be defeated by recovery of the donor from his illness, 1229, 1232.

By his resumption of the gift, 1229, 1232, 1237.

By death of donee prior to donor, 1232.

By birth of child. 1233.

Cannot be revoked by will, as it becomes complete on the death of the donor, 1230.

May be satisfied by a legacy, 1230, 1233.

May be made the subject of election, *ib.*

Not abolished by the Wills Act, 1 Vict. c. 26, *ib.*

DOWER.

Fraud of husband against, before marriage, 618.

Election between, and gifts conferred by the will of the husband, 524. *See* ELECTION.

ELECTION. See CONVERSION, 1.**1. The doctrine of, 510, 541, 542, 545.**

One who accepts the benefit of a transaction cannot set it aside, 513.

Does not arise if desire or bequest is invalid. 548, 550.

Whether this doctrine applies to devises of after acquired real estate, 554, 555.

Applicable when testator gives realty to one set of children, and personality to another set, and gift of realty fails by reason of informality in the will, 550, 554.

Distinction between condition and election. 542, 548, 549, 550, 554.

Persons disappointed by election, entitled to compensation, not forfeiture, 510, 511, 543, 544.

Is not applicable unless there be a fund out of which compensation can be made, 512.

Compensation is afforded by sequestration. 544.

Unless rejected, estate is insufficient. *ib.*

Election may be rendered absolutely binding by lapse of time or circumstances, and may then operate as a forfeiture. 544.

Doubtful whether it applies to grants from the Crown, 513.

Is applicable to deeds as well as to wills, 513, 511.

But gifts must be irreconcilable. 547.

And to interests, remote, contingent, or of small value, as well as to those which are immediate or of great value, 513, 541.

Must appear on face of the contract itself, and not aliunde or by comparison with other instrument's. 513, 542, 543, 546.

And must clearly appear. 546.

Parol evidence not admissible to show intention to comprise another's property under a general devise, 514, 515, 516.

Intention may appear in will itself, 516.

To ascertain intention, will speaks from its date. 547.

Case of arises, whether person disposes of property of another knowingly, or by mistake, 513, 546.

But not readily where he has some present interest in it, 514.

Not excluded by party being expressly put to, between benefits conferred by will, and debts due to them by testator, 516.

May be excluded by intention of testator, *how*, 516, 548.

Devisees of distinct properties not bound to take all or none, 517, 543.

Unless acceptance of both is made a condition by testator, *ib.*

ELECTION, continued,

- Heir put to his election, when, 518, 519, 522, 523.*
Case of, when raised by appointor, 518, 519, 520.
Doctrine of, not applicable as between two clauses in the same will, 520.
Want of capacity to raise case of election by devise, on account of infancy, 521, 522.
On account of coverture, ib.
Of heir of copyholds not surrendered to use of will, 523.
Of heritable property in Scotland, ib.
Heir or other party not put to election between legacy to himself, and giving effect to devise to another, unless the will is so executed as to be capable of operating as a valid devise, 541, 547, 550, 556.
Widow put to her election between dower and gift, by express words, 524, 525, 561.
Or manifest implication, 525, 561.
Not by devise to her of part of the lands of which she is dowable, ib.
Nor by a devise of such lands upon trust for sale though part of proceeds of the sale are given to her, ib.
Or rents are to go as the income arising from the sale, ib.
Nor by a bequest to her, and a devise, either residuary or specific, to a third person, 563, 564.
Nor by gift of an annuity or rent-charge out of such lands, 526.
It seems, that she is, by the gift of a rent-charge, but not of an annuity, chargeable on land, 564, 565, 566, 567.
Testator's dealings in his lifetime not taken in consideration in a case in question of, 527.
Of election, where a life estate in the land is given to the widow, 568, 569.
Widow put to her election by devise, inconsistent with her enjoyment of dower, 527, 528, 529, 542, 560, 561.
Effect of devise to widow, and others in equal shares, 530.
Widow obliged to elect if she has a provision given to her in lieu of dower, although devisee die in life of devisor, 531.
Secus, where there is a gift to the widow in lieu of thirds of personalty, and there is a failure of a bequest thereof, 532.
Bequest in lieu of dower accepted by election is based upon valuable consideration, 570.
Provision in lieu of dower and thirds at common law does not extend to distributive share of personal estate, 532.
Secus, if the words be added "out of any real or personal estate," ib.
Principles as to provision being in lieu and bar of dower, the same at law as in equity, 569.
Words "in lieu of dower or thirds at common law or otherwise," extend to freebench in copy-holds, 532.
Dower of widows married since 1st January, 1834, barred by devise of land, when, ib.
Or of any estate or interest therein, unless contrary intention appears, ib.
Legislative provisions on the subject in this country, 569.
On specific devise of property to co-owner, 533.
Or person claiming under and against a settlement, ib.
Doctrine of election not applicable to creditors taking under a devise, 534.
In Pennsylvania it has been decided to be applicable to creditors, 556, 557.
Not applicable to incumbrances, 534.
Unless intention in the will be clear, ib.
Or to persons taking derivative interests from a person compelled to elect, ib.
Or taking no benefit by an instrument under which question is raised, 535.
Remainderman not bound by election of persons having a prior interest, 536.
Nor one of a class by the election of the majority, ib.
Persons compelled to elect may ascertain relative value of properties, 536, 570.
May file a bill for that purpose, 537.
But bill not necessary, 537.

ELECTION, continued.

Not bound by election made by mistake. 537, 570.

But in absence of fraud or undue influence, election between legal rights is irrevocable, 545.

Election may be either express or implied, 537.

By implication, what amounts to, 537, 571, 572.

May be by matter in pais, 570.

Receipt of rents and profits of two properties between which party must elect, not considered as, 537, 572.

Acts must be done with knowledge of rights, 537, 571.

And with intention of electing, *ib.*

As to what lapse of time will prevent party setting up plea of ignorance of his rights, 538, 544, 571.

May be inequitable to disturb rights of others, *ib.*

Representatives bound by, *ib.*

In some cases where person bound to elect would not have been, *ib.*

Unless they can offer compensation, *ib.*

If doubtful, may be sent to a jury, *ib.*

Case of *Harris v. Watkins* considered, 538, 539.

Practice as to election by infant, 539, 573.

By married woman, 540, 573.

With regard to her interest in real property, *ib.*

With regard to reversionary interest in personalty, *ib.*

Presumption where time is limited for, *ib.*

Rights of parties disappointed by heir electing to take estate contracted for by testator, *ib.*

Legacy duty not payable on personal estate given up by one legatee to another under doctrine of election, 541.

Secus, where testator bequeaths personal property of another, ib.

When election must be made between confirmation or rescission of fraudulent contract, 832, 836.

2. Election to take land or money in its actual state may be made by the absolute owner, 1151, 1168.

Infant cannot elect, 1152, 1169.

Except it be found by the Court to be for his benefit, *ib.*

Lunatic cannot elect, *ib.*

Nor a feme covert by contract or ordinary deed, *ib.*

But by deed executed according to stat. 8 & 4 Will. 4 c. 74, she may elect to take or dispose of money to be laid out in land, *ib.*

Or real estate directed to be converted into money, *ib.*

Even though her interest is reversionary, 1153.

As to the husband's right to elect for his wife, 1169.

Where money to arise from land is to be divided amongst several, none of them can elect to take his share of land, 1153, 1169.

Secus, where money is to be laid out in land, ib.

Remainder-man may elect.

But not so as to affect prior interests, *ib.*

As to election of tenant in tail of money to be laid out in land, *ib.*

Where there are remainders over, *ib.*

Where land has been taken by railway company, *ib.*

Where purchase-money of land taken by company belongs to a married woman, 1154

Election may be made by express declaration, *ib.*

By acts from which election may be presumed, 1154, 1169.

Burden of proof is upon parties averring election, 1170.

Express declaration to elect, may be made by parol, 1154, 1170.

By will, 1154, 1169.

Presumption may arise from slight circumstances, 1155.

By keeping land unsold, 1155, 1169.

But acts having reference to land in possession are not indicative of intention to reconvert those in remainder, 1156.

By declaration of trust in deed, *ib.*

ELECTION, continued.

- By reservation of rent in a lease, 1156.
- By receipt of money to be laid out in land, *ib.*
- But not by receipt of income, 1157.
- By conveying property as land, 1151.
- The heir taking lands by election, takes by purchase and not by descent, 470.
- Principle upon which conversion proceeds, 1157.
- Semble*, law of Scotland as to, seems to be the same as that of England, *ib.*
- Donatio mortis causa may be subject of, 1230, 1236.

EQUITABLE CONVERSION.

See CONVERSION—RESULTING TRUST, 2.

EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS.

- Created by mere deposit of title deeds, notwithstanding the Statute of Frauds, 932.
- And gives an interest in the land, *ib.*
- Deposit of a copy of court roll will create, *ib.*
- Or an agreement for a lease, *ib.*
- Or of certificates of shares in a public company, *ib.*
- Or of a policy of assurance, 933.
- But notice should be given to company, *ib.*
- And a deposit of land order of the New Zealand Company, good without notice, *ib.*
- Of a minute of a lease and pledge of chattels in Scotland, *ib.*
- And does not require registration under Bill of Sales Act, *ib.*
- Prior to *Russell v. Russell*, a mere deposit gave no interest in land except collaterally, 933.
- Effect of a deposit is a contract on the part of mortgagor that his interest shall be liable to debt, *ib.*
- And that he will vest it in the mortgagee, *ib.*
- But agreement on deposit may show a contrary intention, *ib.*
- As to evidence necessary to support an equitable mortgage, *ib.*
- May be a security for subsequent advances, 934.
- Without re-delivery upon sufficient proof of agreement that they were to be so, *ib.*
- And a parol agreement may convert an illegal, into a legal, mortgage, *ib.*
- As when under the old law a deposit was void under usury laws, 935.
- And illegal mortgage made by mistake may be reformed, *ib.*
- Semble*, a deposit for the purpose of preparing a legal mortgage, is a good equitable mortgage, 935, 937.
- But not where a deposit is made *diverso intuitu*, *ib.*
- Parol evidence not admissible to contradict a memorandum in writing made at the time of the deposit, 937.
- But is admissible to extend the lien evidenced by the memorandum, *ib.*
- Where agreement being unstamped is inadmissible as evidence, other parol evidence may be given, 938.
- There must, unless under peculiar circumstances, be an actual deposit, 938.
- Memorandum of deposit of title deeds to secure annuity, formerly required enrolment, *ib.*
- Now registration as against purchaser, mortgagees, and creditors, *ib.*
- By deposit in the hands of a third party, if sufficient, *ib.*
- But not in the hands of a mortgagor's wife, *ib.*
- By secretary of a banking company for the bank, in his own office there, *ib.*
- Deposit with a firm, 939.
- Where new members have the benefit of, *ib.*
- Whether it is necessary to deliver all the title deeds, *ib.*
- Deposit of part of title deeds sufficient, 940.
- As to the priorities of equitable mortgagees having each part of the deeds, *ib.*
- Over the whole of an estate not created by a deposit of deeds relating only to part, *ib.*
- But depositor may be compelled to make good his representations, *ib.*

EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS. *continued.*

Memorandum may confine security to part of the property comprised in the deeds, 940.

By direction to third party to hand them to another, *ib.*

Partial owner only affects his own interest by a deposit, *ib.*

One tenant in common joining with another, merely as to his share, 941.

Legal mortgagee or depositary may, by delivery of the deeds to another person, transfer the mortgage, *ib.*

Lien of person having agreement for a lease charged by deposit of agreement, *ib.*

Deposit by husband of equitable mortgagee no reduction into possession of sum secured, 941, 942.

A deposit is good against the Crown, when, 942.

Against creditors, *ib.*

Unless it be held a fraudulent preference, *ib.*

Against a subsequent judgment creditor obtaining possession under an *elegit* without notice, *ib.*

Against subsequent legal mortgagee, with notice, *ib.*

When notice will be imputed to legal mortgagee, 943.

Notice that title deeds are in possession of another sufficient, *ib.*

Not when he has notice that they are in the possession of solicitor of depositor, *ib.*

Equitable mortgagee parting with title deeds when postponed to subsequent equitable mortgagee, *ib.*

Legal mortgagee or purchaser without notice has priority over equitable mortgagee, *ib.*

Equitable mortgagee may protect his interest by obtaining the legal estate from his debtor, even in contemplation of his bankruptcy, 944.

Equitable mortgagee liable to equities affecting depositor, 944.

As on a deposit by trustee in breach of trust, exception where person having prior equity, enables by his negligence another to create, 945.

Equitable mortgagee parting with deeds, *ib.*

Neglecting to get them, *ib.*

Legal mortgagee negligently giving up deeds, 946.

Equitable mortgagee entitled to priority over vendor's lien, when, 946, 947.

Equitable mortgage, under 27 Eliz. c. 4, is good against a prior voluntary settlement, 947.

Memorandum of deposit of deeds made by banker in Ireland, when registration required, *ib.*

A depositary of a lease is not compellable to take a legal assignment, so as to render himself liable to the covenants, 948.

Although he may have taken possession, or paid the rent, *ib.*

A proviso making void a lease on an assignment does not apply to a mere deposit, *ib.*

Mortgagee by deposit of lease, may, under Irish Ejectment Act, on eviction of lessee, file a bill for redemption against landlord, when, 949.

How realized in bankruptcy, *ib.*

In bankruptcy equitable mortgagee is entitled to rents only from the time of sale, *ib.*

Except he has actually received them, *ib.*

Notice to tenants to pay rents does not alter the rule, *ib.*

Where depositor is not bankrupt, bill may be filed for sale, or foreclosure and an absolute conveyance, *ib.*

Six months allowed for redemption, *ib.*

Except in case of deposit by trustees of charity, *ib.*

A day must be given to an infant to show cause in a decree for foreclosure, *ib.*

Not in case of a decree for sale, *ib.*

Equitable mortgagee may obtain a receiver, 950.

Rights of equitable mortgagee in suit for administration, *ib.*

Will be entitled to interest, though deposit were made only to secure simple contract debt, *ib.*

EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS. *continued.*

And will be entitled to money arising from the sale of the good-will of business carried on upon the mortgaged property. 950.

And to fixtures, though not mentioned in the memorandum upon the deposit, *ib.*

And fixtures will not be within the order and disposition of bankrupt. *ib.*

Bill by equitable mortgagee also specialty creditor against assets of mortgagor, *ib.*

Deposit of deeds relating to estate in Scotland enforced, *ib.*

Right of depositor not affected by loss of deeds. 951.

Court of bankruptcy cannot order sale on, after suspension of proceedings under the 110th section of the Act of 1861. 951.

Proceedings in Chancery by trustee under a requisition of an equitable mortgagor, *ib.*

Equitable mortgage by deposit of title-deeds valid in New York, South Carolina and Wisconsin. 951.

And with some restrictions in Mississippi. 952.

Not valid in Pennsylvania, Kentucky or Ohio. 952. 953.

A written agreement to give a mortgage, or a mortgage which fails from want of due execution at law, may be sustained and enforced in equity 954.

Aliter in Ohio, 954.

EQUITABLE WASTE.

See **WASTE**.

EQUITY TO A SETTLEMENT.

Of wife. out of her own property, 639, 670.

The principle prevails in this country. 670. 672.

Jurisdiction first assumed to compel settlement, where the assistance of the court was sought to obtain the property, 639, 673.

Wife may now assert her equity as plaintiff, 639, 674.

Necessity for doing so diminished by the Married Woman's Property Act, 640.

When assignee sues, wife may interpose by petition, 677.

It is binding against husband, 640, 675.

His assignees in bankruptcy, *ib.*

Under the Insolvent Debtor's Act, *ib.*

Under an assignment for payment of debts, *ib.*

And against his assignee for valuable consideration, *ib.*

And generally, in this country, against all who claim through or under the husband. 675.

As against right of executor or administrator to retain or set off for debt of husband to estate, 641.

Wife entitled to settlement out of equitable property, 641, 673.

Out of a legacy, though charged on land, *ib.*

Possible estate by curtesy of husband in an equitable estate of wife not interfered with, *ib.*

Out of legal property, the subject of a suit in equity, according to *Sturgis v. Champneys*, 642, 643, 644.

But semble not where bill is filed by the wife in such case, 644.

And generally out of any property within the control, or subject to the jurisdiction of the Court. 673.

As where a creditor or assignee seeks to recover a debt by or through the aid of an assignment, which does not transfer the legal title, and therefore confers a right which is merely equitable. 673.

But settlement will not be decreed where husband can recover or obtain possession at law, or by virtue of a legal right, and without the aid of equity or equitable principles, 673, 675.

Nor of estate tail in money, *ib.*

Or in land, *ib.*

Entitled to, out of sum of money arising from rent of real estate paid into Court, 645.

Out of a trust term in land, 645, 646.

EQUITY TO A SETTLEMENT, *continued.*

Out of estate tail in possession, during term to secure jointure, 646.

Mortgagee in possession of wife's freehold, not allowed, as against assignees of husband, payments to wife, *ib.*

Wife not entitled to out of legal interest in leaseholds as against mortgagee of husband seeking foreclosure or sale, 647.

Entitled to redeem, when, *ib.*

Out of a *life-interest* or income of equitable property, on husband becoming bankrupt or insolvent, *ib.*

Or upon husband deserting his wife, 647, 673, 677.

But not when she is living with and is maintained by him, *ib.*

Nor as against assignee, for valuable consideration of the husband, before insolvency and desertion, 648-651.

Although the interest of the wife at the time of the assignment was reversionary, 651.

Out of property wife is entitled to before as well as after marriage, 652.

But not out of reversionary personal property, *ib.*

But see now 20 & 21 Vict. c. 57, *ib.*

Settlement always extended to *children*, 652, 676.

But the equity is personal to the wife *ib.*

Children cannot insist upon a settlement after the death of wife, unless she has asserted her right to one,

And she may at any time, before a settlement is completed, defeat their interests by waiving her right, 653, 676.

But if she has not waived her right, having entered into a contract, or obtained a decree for a settlement, the rights of the children will not be defeated by her death, without waiver, *ib.*

So, if she has obtained decree for settlement, 653.

Although the children are not mentioned in the decree, *ib.*

Unless omission is a long time acquiesced in, *ib.*

The rights of the children do not attach upon filing of a bill merely, 634.

Wife may at any time waive her equity to a settlement before it is actually made, 653, 654.

But when she has insisted upon a settlement as against her husband's assignees, she cannot waive it in his favor, 655.

As to the *amount* of wife's property to be settled, 656, 657, 658, 676.

Extends in general to a reasonable and adequate settlement, due regard being had to all the circumstances, 676.

Wife, on obtaining decree for judicial separation on the ground of cruelty, entitled to her *choses in action* absolutely, 658.

As to the *mode* of settlement, 659.

Wife's consent to waive right to settlement, how taken, *ib.*

In court, *ib.*

Under a commission, 660.

Abroad, *ib.*

Cannot be taken till amount of fund be ascertained, *ib.*

Except when only liable to deduction of costs, *ib.*

Not binding when given under mistake, *ib.*

Time for transfer to husband, under consent, may be postponed by court, *ib.*

Consent by wife may be retracted before transfer, *ib.*

No person connected with husband should be present at examination, *ib.*

Affidavit to be made by husband and wife on waiver by wife of settlement, *ib.*

If there be previous settlement, it must be produced, *ib.*

Wife domiciled in the country where husband is not obliged to make a settlement, cannot claim one, 661.

Unless she is ward of court, *ib.*

Husband, if not an alien, may elect to take land of wife directed to be converted into money, *ib.*

As to proof of foreign law, *ib.*

Consent not requisite where the fund is under £200, *ib.*

But fund must be shown not to be in settlement, *ib.*

Except where it is very small, *ib.*

EQUITY TO A SETTLEMENT, *continued.*

Practice in Ireland, 661.

Wife may claim a settlement though fund under £200, *ib.*

Married woman cannot waive her right to take reversion or personalty by survivorship, 662.

An infant feme covert cannot give her consent, 662, 678.

Female ward of Court cannot waive her equity to a settlement, when, *ib.*

Settlement made on her marrying without consent or in contempt of Court, 662, 673.

And settlement much less favorable to husband than in ordinary cases, *ib.*

Especially when he marries merely to get the ward's property, *ib.*

On coming of age, ward, married with consent of her guardian, allowed to waive her right to a settlement, *ib.*

Court has no power over property of an infant not its ward, *ib.*

Wife's equity to a settlement will be defeated by payment to the husband or his assignees, *ib.*

And they will not be restrained from proceeding at law, *ib.*

But trustees cannot safely pay the husband after a bill filed, *ib.*

Injunction granted to restrain husband from proceeding in the Ecclesiastical Court for a legacy, 663.

Wife not entitled to, where her debts to a greater amount than funds are proved against the husband in bankruptcy, *ib.*

Secus if they are less, *ib.*

Wife's equity barred by an adequate settlement, *ib.*

Although they are living apart by mutual consent, *ib.*

Or by express stipulation before marriage, *ib.*

By her fraud, 664.

By her adultery, *ib.*

Except under peculiar circumstances, *ib.*

Even then husband not allowed to receive whole of her property while he does not maintain her, *ib.*

Not barred while both husband and wife are living in adultery, 665.

Nor in the case of a ward of the Court, married without its consent, although she alone be living in adultery, *ib.*

On husband refusing to make a settlement, Court retains fund, giving the wife the chance of survivorship, *ib.*

But husband takes income when he lives with and maintains his wife, 665, 677.

So when husband and wife are tenants by entireties of a fund, *ib.*

But payment to husband of fund to which he and his wife are entitled by entireties, good, *ib.*

Dividends paid to wife of lunatic husband, when, *ib.*

According to Lord Hardwicke, if husband will not make a settlement, Court will not allow him to receive income, 666.

Maintenance allowed to deserted wife out of her equitable property, 666, 677.

And out of her life interest as against his assignees in bankruptcy or insolvency, *ib.*

Not when husband is maintaining her, though he is in difficulties, 666.

Nor as against his assignee for value, *ib.*

Though husband afterwards becomes bankrupt or insolvent, *ib.*

But allowed as against husband deserting his wife, *ib.*

Persons making advances to be reimbursed out of capital, when, *ib.*

Bill in equity may be maintained for repayment of advances, *ib.*

Maintenance not defeated by husband's conveyance for payment of his debts, 667.

Separate maintenance not continued upon husband consenting to live with wife and use her kindly, *ib.*

Husband leaving country in course of his duty does not desert his wife, *ib.*

Wife entitled to maintenance or settlement, when husband's conduct renders her leaving him justifiable, *ib.*

Separate maintenance not allowed when wife has adequate provision already, *ib.*

Or she has eloped and lives in adultery, 668.

EQUITY TO A SETTLEMENT. *continued.*

But husband not allowed the income, 668.

Though the court endeavors to force husband to an agreement as to future support of his wife, *ib.*

Rights of husband entitled to wife's income not affected when her misconduct causes a separation, *ib.*

Settlement directed by court, good against creditors, *ib.*

So if settlement is made by husband, pursuant to agreement with trustees, 669.

Secus, if husband made a settlement after he has reduced fund of wife into possession, *ib.*

When trustee justified in paying fund into court, 670.

Distinction between wife's ordinary equity and her claim to maintenance, in case of the husband's insolvency or desertion, 674, 678.

Difference of the extent, ground, and nature of relief given by equity, in different cases, 674, 675.

Wife's equity a sufficient consideration to support a post-nuptial settlement against creditors, 678.

See **RESULTING TRUSTS.**

ESTOPPEL.

When mortgagor estopped by declaration of no offset, 876-880.

EVIDENCE.

Admissibility of parol. See **PAROL EVIDENCE.**

See **ADVANCEMENT—EXECUTED AND EXECUTORY TRUSTS—PRINCIPAL AND SURETY—SURETIES—RESULTING TRUSTS.**

EXECUTED AND EXECUTORY TRUSTS.

Distinction between trusts executed and executory, 13, 14, 36, 45.

What is a trust executed, 14, 46.

Executory, 14, 36, 46.

Executed trusts construed in the same manner as legal limitations, 14, 46.

Executory trusts construed according to the intention of the author of the trust, 14, 47.

Trusts not rendered executory by a mere direction to convey, 14, 36.

Or by direction to correct any defect or incorrect expression in a will, 15.

Distinction between executory trusts in marriage articles and wills, 15, 36, 45.

1. **Executory trusts under marriage articles, 16.**

Rule in Shelley's case, when not applicable, *ib.*

Construction to be put upon "heirs of the body," 17.

"Issue," *ib.*

"Children," *ib.*

"Heirs female," *ib.*

Rule in Shelley's case applicable to, where the concurrence of both parents is requisite in order to defeat the provision for issue, 19.

Or where the parties made a distinction between limitations in strict settlement, and limitatious leaving it in the power of one of the parents to bar the issue, *ib.*

Words in articles strictly applicable to a joint tenancy, when decreed in equity to confer a tenancy in common, 19.

Declaration made by decree as to meaning of articles to save expense of settlement, *ib.*

Construction of postnuptial articles for a settlement on a son and his issue, *ib.*

Agreement or covenant to settle chattels, upon the same trusts as real estates in strict settlement, how executed, 19.

Rule in Shelley's case, not applied to executory trusts in New York, 38, 39.

In Georgia, 42.

In Tennessee, ib.

In South Carolina, 44, 45.

Dicta in other states, 47.

If a settlement in the very words of executory articles would defeat the intention, the settlement shall be according to the intention and not the words, ib.

EXECUTED AND EXECUTORY TRUST, *continued.***2. Executory trusts in wills, 21.**

Intention that heirs of the body or issue should take by purchase must appear in the will itself, *ib.*

What is a sufficient indication of such intention, 22, 23 24.

Where the trusts of land to be purchased are expressly declared, they will be construed in the same manner as at law, 24.

Construction of the words "issue," "heirs of the body," 25, 26.

"Issue in tail male in strict settlement," 25.

Limitations to trustees to preserve contingent remainders, when inserted, 26.

Freehold vested in trustees, when, *ib.*

Direction to entail real and personal estate, how carried out, *ib.*

Land in Scotland, *ib.*

To settle lands to go with ancient barony, *ib.*

A modern barony, *ib.*

Where real and personal estate directed to be settled on same trusts, real estate not conveyed upon trusts for sale, *ib.*

Word "family" how construed, *ib.*

Jointure on second wife, when authorized, 27.

Chattels given by will, with reference to the limitations of real estate in strict settlement, *ib.*

Effect of execution of disentailing deed of real estates, 28.

Family jewels limited by executory trust as heir-looms, *ib.*

Doctrine of cy-pres as applicable to executory trusts, 29.

3. What powers will be inserted when a settlement is directed to be made with usual or proper powers, 29, 30.

Direction to insert powers may be implied, 30.

None will in general be inserted unless there is some direction, *ib.*

Except perhaps a power of leasing, *ib.*

But in recent cases powers more readily directed to be inserted in settlements, 30, 31.

Power to wife to give life interest in her settled property to her husband, 31.

Hotchpot clause, when inserted, *ib.*

Tenant for life of settlement when directed to be made, not dispunishable for waste, 31, 32.

Court can give powers of leasing under 19 & 20 Vict. c. 120, 32.

Powers under Lord Cranworth's act, *ib.*

4. Rectification of Settlement, 32.

By will, *ib.*

By marriage articles,

Evidence of mistake, how far admissible, *ib.*

Distinction between settlements made before and after marriage, 34.

Voluntary settlements not reformed as against the grantor, 34. *See VOLUNTARY DEEDS AND CONTRACTS.*

Not as against purchasers for valuable consideration, without notice, 35.

Secus if, with notice, *ib.*

Reconveyance sometimes directed, *ib.*

Settlement sometimes rectified by decree without deed, *ib.*

Even upon petition, *ib.*

In whose favor equity will decree execution of executory trusts, 47.

EXECUTION CREDITOR. *See* CREDITOR.

May purchase property seized under an execution, 231.

EXECUTOR.

Executor, renewal of lease by, 49. *See* CONSTRUCTIVE TRUSTS.

How far purchasers from, are bound to see to application of purchase-money.

See APPLICATION OF PURCHASE-MONEY, 2—CHARGE OF DEBTS.

How far charge of debts authorizes sale of real estate by, 100-106.

Executors or administrators, or trustees for them, cannot purchase the assets, 225.

Nor can they, or their agents, purchase the real estate of the testator when sold for the payment of his debts, 246, 248, 253.

EXECUTOR, continued.

Even when there is no personality. 248.

Rule in North Carolina, South Carolina, and Alabama, 248.

And if they buy in debts or mortgages for less than is due, it will be for the benefit of the estate, 225.

Purchases by, only voidable on application of creditors and heirs of intestate, 257.

Sale to relative closely scrutinized, 246.

Confirmation of purchase by, 257, 258, 259.

EXECUTOR DE SON TORT.

Renewal of lease by, 85.

EXECUTORY TRUSTS. See EXECUTED AND EXECUTORY TRUSTS.**EXEMPTION OF PERSONALTY FROM DEBTS.**

Primary liability of personality for payment of debts, 892, 917.
of legacies, 920.

Unless exempted by express words, or manifest intention, 892, 917.

A charge upon land, or direction to sell, or a creation of a term for payment of debts, will not exempt the personal estate, 893, 917, 918.

Nor will a devise upon condition of paying debts, *ib.*

Parol evidence not admissible to show the testator's intention, 893, 929.

When intention is doubtful reference may be made to state of testator's property at date of the will, 929, 930.

Nor will any inference of the testator's intention be drawn from the relative amount of his personal estate and debts, 893, 929.

Will not arise from a mere charge of funeral or testamentary expenses, or both, in addition to debts upon real estate, 894.

But it will when intent to give the personality as a specific legacy, appears by a charge upon the real estate, of all the burthens which naturally fall on the personality, 894, 918, 919.

As to what are expenses "of the execution of the trusts of a will," 895.

Does not arise by personality being expressly subjected to some charges to which it is primarily liable, 895, 896.

Nor by a bequest of *all* the personality, though lands are devised in trust for payment of debts, 896, 920.

Inference against, when legatee is also executor, *ib.*

Does not arise when he is not executor, *ib.*

Distinction between a mere residuary bequest and a gift of *all* the personal estate, 897.

An express bequest of the whole personality will, it seems, exonerate it in New York and South Carolina, 920, 929.

And in Pennsylvania, if attended with a devise of the land, on condition of paying the debts, 920.

Where there has been a charge of the debts and funeral and testamentary expenses on real estate, 897.

Not applicable when personal estate is also charged with their payment, *ib.*

Testator may remove primary liability to another fund, *ib.*

How real estate applicable for, when personality exempted from payment of debts, 897, 898.

In favor of legatees will not extend to next of kin taking in consequence of a lapse, 898.

Inference of, does not arise from appointment of executor, entitled to personal estate by his nomination, there being no residuary bequest, 899.

Though debts and funeral expenses are thrown on land, *ib.*

Nor where executor is trustee for next of kin, *ib.*

Secus, where personality expressly exempted and any other fund provided, *ib.*

Personal estate primarily liable where gift of legacy or annuity is followed by a charge on real estate, *ib.*

Distinction between a general charge of legacies, and a trust to pay particular sums out of real estate, *ib.*

Whether a legacy is specific or demonstrative, 899, 900.

EXEMPTION OF PERSONALTY FROM DEBTS, continued.

Real estate primarily liable when devised upon a trust to raise a particular sum for payment of debts, 900.

Or to pay a particular debt,

So where a specific personal fund is subjected to charges, otherwise falling on general personal estate, it is primarily liable, *ib.*

Except when residue is undisposed of, *ib.*

When particular fund for payment of debts is insufficient, other property will be applicable in the usual order. 901. See **EXONERATION**.

Lands descended are liable before pecuniary or specific bequests, 918, 919.

And so are lands devised on condition of or for the payment of debts, 918, 919.

But general bequests are liable before lands descended, 920.

Rule on this point in New York and South Carolina, 920, 929.

Lands devised and specific bequests, contribute equally to the payment of debts which are liens or charges on the land in their own nature, 928.

EXONERATION.

1. Law as to, altered by 17 & 18 Vict. c. 113, amended by 30 & 31 Vict. c. 113, 901.

Previous to that Act personal estate primarily liable to pay the mortgage debt of a deceased person, *contracted by himself, 902, 922.*

Whether the land devolved upon heir-at-law or devisee, *ib.*

Un ess, in the case of a devise, it was the testator's intention that the land be taken cum onere, *ib.*

A devise of land charged with, or in trust to sell for payment of a mortgage debt, is sufficient to exonerate personalty. *ib.*

Not where estate is devised *subject to mortgage, 902.*

Where mortgage debt is not the devisor's or ancestor's *own debt*, the mortgaged estate will be primarily liable, 903, 922.

Unless the debt has been adopted by him, *ib.*

Entering into a covenant for payment on a transfer of the mortgage will not amount to an *adoption of the debt, 903, 924.*

Nor the execution of a bond, *ib.*

Nor obtaining a small further advance, although additional security be given for the whole, 903.

Nor a covenant to pay a higher rate of interest, *ib.*

Nor obtaining an additional advance to pay off arrears of interest and simple contract debts of persons from whom estate came, *ib.*

Nor a mortgage of lands to pay debts and legacies of ancestor or devisor, *ib.*

A charge of land with debts not an adoption of mortgage debt of ancestor or devisor, *ib.*

Nor the purchase of an estate subject to a mortgage, 904, 923, 927.

Though purchaser covenants or agrees with vendor to pay the mortgage debt, *ib.*

Sale of land subject to mortgage, renders purchaser liable for the payment of the mortgage debt to the vendor, 923.

But not to the mortgagee, without an engagement to him, 924.

Rule on this point in Tennessee and Ohio, 927.

Mortgage debt will be adopted where purchaser covenants to pay mortgages, and there is a new proviso for redemption, 904.

Where he covenants to pay mortgage and there is a new proviso for redemption, *ib.*

Charge on estate to secure debt to vendor is purchaser's own debt, *ib.*

Whether it be a gross sum or annuity for life, *ib.*

Where charge is part of the price, purchaser adopts debt, *ib.*

Mortgage debt primary charge on real estate, where the heir or devisee of mortgagor taking the estate is also his executor and residuary legatee, 905.

Secus, on the death intestate, without taking out letters of administration, of the person who became entitled to the real and personal estate of the mortgagor on his death intestate, 906.

EXONERATION, continued.

- Real estate primarily liable where there is a charge to secure portion or jointure, 907.
- Or where tenant for life raises money under a power, ib.
- Though he has an absolute power over the estate, and covenants to pay the money, 908.
- As to effect of tenant for life becoming absolute owner by failure of intermediate limitations, ib.
- Primary liability of estate aliened or settled by mortgagor, ib.
- On payment of debt afterwards he would be a creditor, ib.
- Unless settlement contains covenants to pay the debt, 909.
- As to effect of lapse of time on exoneration, ib.
- Land not entitled to be exonerated from mortgage, at the expense of personality which has been bequeathed pecuniarily or specifically, 927.*
2. Primary liability of personal estate taken away by 17 & 18 Vict. c. 113, 909.
- And by Revised Statutes in New York, 922.*
- But law remains unaltered as to mortgaged property, not being "any estate or interest in any land or other hereditaments," 909.
- Copyholds and freeholds are within the act, ib.
- Semble, not leaseholds for years, 909.
- Act only applies where there is a defined charge on a specified estate, 910.
- Applies to equitable mortgage of freeholds by deposit, ib.
- But not to vendor's lien, ib.
- Except under 30 & 31 Vict. c. 69, ib.
- Act applies in favor of the Crown claiming personality for want of next of kin, ib.
- Proviso to act not applicable to heir taking by descent, ib.
- Though he takes in consequence of a lapse in a will made before 1 Jan., 1855, ib.
- Applies to devisee, when, ib.
- Meaning of "contrary or other intention" under Locke King's Act, ib.
- Examples of, 911.
- Where other fund provided, act does not apply, 912.
- Locke King's Act amended by 30 & 31 Vict. c. 69, ib.
- Not applicable to lien for unpaid purchase-money on land purchased by an intestate, ib.
- What amounts to a declaration of intention under both acts contrary to the rule of Locke King's Act, 912, 914.
- Land devised upon trusts for conversion not within Locke King's Act, when, 914.
- Freeholds and leaseholds mortgaged together, ib.
- If not exonerated must bear burthen rateably, ib.
- Estate charged in aid of another primarily liable, ib.
- Lands specifically devised, and lands comprised in residue, contribute rateably, 914, 915.
3. Order in which assets are applicable in the exoneration of mortgaged estates, 915.
1. When the mortgaged estate is devised, ib.
2. Where it descends to the heir, 917.
- Election of mortgagee to come upon personality will not determine fund ultimately liable, as doctrine of marshalling would be applicable, ib.
- Order in which assets are marshalled for the payment of debts, generally, 927.*
- See MARSHALLING ASSETS.*

EXPECTANTS.

Purchases from, 809. *See CATCHING BARGAINS.*

EXTINGUISHMENT OF DEBT.

When payment by third person will operate as, 151.

See PAYMENT—PRINCIPAL AND SURETY.

FAMILY.

Construction of word, when used in executory trust in will, 26.

FEME SOLE TRADER.

When married women's estate liable for purchases made as, 762.

FICTITIOUS PERSON.

Purchase in name of, 324. *See* RESULTING TRUSTS.

FIDUCIARIES.

Purchases by, when set aside, 212. *See* TRUSTEE.

FORFEITURE.

Persons electing to take against instrument not subject to, 510, 511, 544.
See ELECTION.

FRAUD.

Distinction between what constitutes fraud at law and in equity, 620, 804, 806, 826, 828.

Contracts and conveyances obtained oppressively and unduly, fraudulent in equity, 826, 830.

Whether contract vitiated by, can be confirmed, 830.

See CATCHING BARGAINS—STATUTE OF FRAUDS.

FRAUD ON MARITAL RIGHTS.

Settlement made during treaty of marriage, without notice to intended husband, will be set aside, 611, 618.

And this, irrespectively of the married women's statutes, 619.

But not if the husband was not, or is not proved to have been, the intended husband at the time of the execution of settlement, 612.

Actual fraud in woman holding out herself as absolutely entitled to property which she afterwards settles, *ib.*

Concealment of property, and settlement made during treaty for marriage, a fraud on husband, 612, 619.

But a fraud cognizable only in equity, 620.

Same, settlement not rendered valid by its being in favor of meritorious objects, as children by a former marriage, 613, 623.

Opinion of Sir James Wigram, V. C., 614, 615, 616.

Gift or settlement will not be set aside, if husband is aware of it previous to marriage, 616.

Burden of proving husband's knowledge of instrument is upon those claiming under it, 619.

Or, if not being aware of it, he by seducing his wife previous to marriage, has put it out of her power to stipulate effectually for settlement, 616.

Concurrence or acquiescence by husband, though an infant at the time of marriage, will preclude him from disputing settlement, 617, 621, 652.

Or if he afterwards confirm it, 617.

But mere acquiescence and confirmation after marriage is not confirmation, 623.

Security by wife, prior to marriage, set aside if voluntary, 617.

But not if for valuable consideration, *ib.*

May be committed by wife availing herself of powers conferred by the Married Woman's Property Act, 1870, *ib.*

Settlement in fraud of husband not void under Stat. of Eliz. 27, c. 4, 618.

Whether equity will interfere against secret acts of husband before marriage to deprive wife of dower, *ib.*

FRAUD UPON A POWER.

Principle upon which the court acts in setting aside, 578, 579, 601.

Fraud upon a power of jointuring, where the husband advances money to increase his power, 579.

Or appoints jointure partly for his own benefit, *ib.*

Jointure affected to the extent of the fraud only, *ib.*

Appointment to child in consideration of mother postponing jointure to mortgage, void, *ib.*

Fraud upon power of appointing amongst children, upon a bargain by the appointor for his own advantage, 579, 601.

FRAUD UPON A POWER, continued.

Court will not interfere upon mere suspicion, 601.

Appointment invalid as, although it be not for the advantage of the appointor, if not *bona fide*, 580.

Although objectionable arrangement be not made known to appointee, *ib.*

Exercise of discretionary power by donee, who was bound by verbal promise to donor, held valid, 602, 603, 604.

But this is unsound, 604.

Upon a power of appointing amongst strangers, 581.

Even although appointor was by voluntary deed donor of the power, *ib.*

Burthen of proof lies upon person seeking to prove fraud, 582.

When not, 583.

Effect of appointment made for purpose of a settlement, 583, 584.

Costs of trustees suspecting, declining to transfer, *ib.*

Fraudulent appointment, how far void, 582, 585, 586.

In the case of a power to jointure, 585.

of a power to appoint to several objects, *ib.*

Distinction by Sir W. Grant between power to appoint a jointure and a power to appoint to children, 586.

Authorized purpose in an appointment may be severed from unauthorized purpose, 587.

Appointment in fraud of a power, void as against purchaser for valuable consideration, with notice, *ib.*

Or without notice, if the purchaser has only got an equitable interest, *ib.*

Actual notice, and not mere grounds of suspicion, are necessary in order to affect a purchaser, *ib.*

Effect of lapse of time, 588.

Where a parent executes a power, all the children may, by arrangement, agree to give an interest to the parent, *ib.*

Secus, unless it appears to be a *bona fide* family arrangement, *ib.*

Anger and resentment on the part of the appointor, no reason for setting aside appointment, *ib.*

Appointment to child with unauthorized condition attached, is good, 589.

But the condition is void, *ib.*

Parent not allowed to take a portion raised for a child not in want of it, as administrator to the child, *ib.*

Especially if appointment was made in expectation of child's death, *ib.*

Appointment of sum already set apart not invalid merely because parent may take in event of child's death, 590.

A fortiori where parent can take nothing, *ib.*

Advancement under a power by trustees to infant to purchase a commission to enable him to sell it, *is, ib.*

Secus, where purchase *bona fide* made, though sale afterwards takes place, *ib.*

Power to appoint amongst children may be released by tenant for life, 591.

May covenant not to exercise power of charging, *ib.*

Or to make an appointment in favor of a child, *ib.*

Father cannot release power so as to vest property intended for his children in himself, *ib.*

Secus, in the case of his mortgagees, 397, 398.

Appointment set aside when necessary consent to it obtained by fraud, 592.

Or given for the mere purpose of putting money into the hands of the father, *ib.*

Whether appointment set aside as fraudulent can be again exercised, 593.

Onus of proof of validity when made to the same appointee, *ib.*

Whether appointment exercised by will pursuant to a covenant, is valid, *ib.* See **ILLUSORY APPOINTMENT.**

Motives which have led to the exercise of a discretionary power, or the results which it will produce, cannot be investigated, or the power controlled at law, but may in equity, 599, 600.

More prudent for trustees exercising powers not to state their reasons for so doing, 598.

FUTURE ADVANCES.

When protected by lien of prior mortgage, 857, 870.

See MORTGAGE—LACKING.

GIFT.

Donee takes subject to conditions imposed by donor, 420.

Must be absolute, 1230.

When valid as a donatio mortis causa. See DONATIO MORTIS CAUSA.

Not enforced by equity when left incomplete at law, if the law affords the means to make and complete it, 420, 1230.

Unless made to wife or child, or sustained by some equally meritorious consideration, 427, 430.

Gift of chose in action or other interest which cannot be passed at law, should, as it would seem, be valid in equity, when donor has done all that lies in his power to complete the gift, and manifest his intention to give, 429, 431.

Gift of debt or chose in action, requires the execution and delivery of deed or instrument of gift, or of the instrument by which the debt is evidenced or created, 431, 1233, 1234, 1237, 1238, 1345. See DONATIO CAUSA MORTIS.

Oral gift of land invalid at common law, and under the Statute of Frauds, 1046, 1048.

May be taken out of statute and rendered binding in equity, by an entry and expenditure of money on the land on the faith of the gift, ib.

If not entirely, at least so far as to entitle the donee to compensation for amount expended, ib.

See VOLUNTARY DEEDS AND CONTRACTS.

GRANT.

When words of, operative as a covenant, 444.

GUARANTOR.

When statute of limitations is bar to remedy of, 145.

When entitled to rights of subrogation, 145, 146, 150.

GUARDIAN AND WARD.

Purchase by guardian, of ward's estate, on his coming of age, improper, 232.

If he buys up incumbrances on the ward's estate, he will be trustee of them for his ward, ib.

A purchase by guardian, at his own sale, of real and personal estate, may be set aside as fraud by the ward on coming of age, 249.

Doctrine in Pennsylvania as to the purchase by a guardian at a sheriff's sale of the ancestor's estate, 254.

Renewal of lease by, 49.

See APPLICATION OF PURCHASE MONEY.

HEIRLOOMS.

When specific delivery of, decreed, 1111.

HEIR.

When put to election, 518, 522, 523. See ELECTION.

Purchaser from, 809. See CATCHING BARGAINS.

HEIRS FEMALE.

Construction of words when used in marriage articles, 17.

HEIRS OF THE BODY.

Construction of words when used in marriage articles, 17.

In wills, 21.

HUSBAND AND WIFE.

When resulting trust enforced against husband purchasing with his wife's funds, 322, 342, 344.

Defective execution of power aided in favor of wife, 368.

But not in favor of husband, 369.

When agreement by husband will be enforced in favor of wife, 427.

HUSBAND AND WIFE, continued.

In attacking gift from husband to wife, his circumstances at time of gift are to be considered, 442.

See CONVERSION—ELECTION—EQUITY TO A SETTLEMENT—FRAUD ON MARITAL RIGHTS—PIN MONEY—PARAPHERNALIA—SEPARATE USE.

ILLUSORY APPOINTMENT.

What amounts to, 593, 596.

Soundness of principle has been questioned, and doctrine condemned in this country, 600, 601.

Share not illusory, to an object of the power in default of appointment, good, 596.

Unauthorized exclusive appointment may be rendered valid by its partial failure as being a fraud on the power, *ib.*

Last of illusory appointments only void, *ib.*

Illusory appointment not rendered justifiable by misbehavior of child, but it may be by other circumstances, as where child is an uncertificated bankrupt, 597.

Or has had a provision from the donee of the power, *ib.*

Or, it seems *aliunde*, *ib.*

But not where provision has moved from the donor of the power, *ib.*

Equitable rule as to illusory appointments abolished by statute, *ib.*

Clause recommended by Lord St. Leonards, where donor wishes all objects to have substantial share, 597, 598.

Statute as to, does not make valid exclusion of objects of power not authorizing exclusive appointment, 598.

Statute has retrospective operation, *ib.*

IMPLIED POWERS.

To give receipts for purchase money, 79, 86, 87.

See APPLICATION OF PURCHASE MONEY.

IMPLIED TRUSTS.

See TRUSTEE.

When estate of married women liable for, 757, 761.

See PART PERFORMANCE OF AGREEMENT.

INCLOSURE COMMISSIONERS.

When incapable of purchasing, 232.

INFANT.

See CONVERSION—ELECTION.

INJUNCTION.

Specific performance of agreement *not* to do certain acts enforced by, 1089.

Doctrine in this country, 1106.

When granted to restrain waste. *See* WASTE.

INSOLVENCY.

When ground for enforcing specific performance of agreement relative to chattels, 1099.

Of a co-surety. See SURETIES.

INTEREST.

Surety can claim, in equity, upon money paid by him, 126.

ISSUE.

Construction of word, when used in marriage articles, 17.

In will, 25.

JOINT DEBTORS.

When right to subrogation exists between, 147.

JOINT PURCHASERS.

Purchasers taking a conveyance to themselves and their heirs, joint tenants at law, 268.

JOINT PURCHASERS, continued.

And in equity, unless the rule of law is controlled by the presumed intention of the parties, 268.

Where purchase-money is advanced in equal proportions purchasers will be joint tenants, 268 285.

Strong leaning in equity against joint-tenancy, 269, 285.

An unequal advance of the purchase money will create a tenancy in common in equity, *ib.*

And whether the proportions are equal or unequal, there will be a tenancy in common of money advanced upon mortgage, 270.

Rule on this point in the United States, 285.

Or upon purchase by joint mortgages of mortgaged estate, 270.

Or upon foreclosure, 270, 285.

Circumstances may show a contrary intention, *ib.*

Parol evidence to prove intention, how far admissible, 187.

Of property purchased for a joint undertaking or partnership, tenants in common in equity, 271, 272, 273, 274.

Although conveyance be taken in the name of one of the partners, 274.

But partner may repudiate contract, *ib.*

Whether property purchased with partnership assets is joint or separate property, 274, 286.

When real estate will be treated as partnership property, 286, 299.

Lands held by, for partnership purposes, liable to lien of partner for advances, 284.

Secus, when they are mere joint owners, 1165, 1168. *See* CONVERSION, 6—PARTNERSHIP PROPERTY.

Where property has been left by will to persons jointly, they will be joint tenants, 275.

Unless a severance of the joint tenancy can be inferred, *ib.*

Rights of subrogation between, 147.

See STATUTE OF FRAUDS.

JOINT TENANTS.

Words applicable to construed as creating tenancy in common in marriage articles, when, 19

Purchases by. *See* CONSTRUCTIVE TRUSTS.

JOINT TENANTS, CO-PARCENERS, AND TENANTS IN COMMON.

Joint-tenants, co-parceners, and tenants in common entering under the same instrument or act, are trustees for one another to preserve the estate, and an adverse title or incumbrance bought by one, enures to the equal benefit of all, 68, 73.

JUDGE.

Judgment of, where he has interest in subject of suit, set aside, 230.

JUDGMENT.

Against married woman, when valid, 756.

Whether after payment judgment can be kept alive by oral agreement, 870.

See PRINCIPAL AND SURETIES—SURETIES.

LAND.

When impressed with the character of personality. *See* RESULTING TRUSTS, 2.

LEASE.

Renewal of, by fiduciary. *See* CONSTRUCTIVE TRUSTS.

From mortgagor to mortgagee, 215, 216.

Trustee cannot take from himself, 217. *See* STEWARD—TRUSTEE.

When provision for, inserted in settlement. *See* EXECUTED AND EXECUTORY TRUSTS.

LEGACIES.

Primary liability of personality for payment of. *See* EXEMPTION OF PERSONALTY FROM DEBTS.

See APPLICATION OF PURCHASE MONEY.

LEGACY DUTY. *See* CONVERSION.

LEGATEES.

When entitled to follow assets into hands of purchaser for value, 97.

See APPLICATION OF PURCHASE MONEY.

LIEN. *See* VENDOR'S LIEN—MARSHALLING—PRINCIPAL AND SURETY—SURETIES.

LIMITATIONS.

Usual, inserted in marriage articles and wills. See EXECUTED AND EXECUTORY TRUSTS.

See STATUTE OF LIMITATIONS.

LUNATIC. *See* CONVERSION—ELECTION.

MAINTENANCE.

Of wife out of her equitable property, 665. See EQUITY TO A SETTLEMENT.

MARRIAGE.

Not of itself sufficient part performance of contract to exempt it from Statute of Frauds, 1039, 1040.

Articles. See EXECUTED AND EXECUTORY TRUSTS—HUSBAND AND WIFE.

MARSHALLING.

Between vendor's lien and personal assets of the vendee, 473.

In favor of simple contract creditors and legatees, where the purchased estate descends, ib.

But in favor of simple contract creditors only, where it is devised, 357.

Inapplicable to simple contract debts in cases within 3 & 4 Will. 4, c. 104-357. See MARSHALLING, vol. 2—PARAPHERNALIA.

General rules under which assets are marshalled for the payment of debts after death, 927.

By whom and out of what assets mortgage payable, as between heir or devisee and executor, 904, 909, 922, 927.

Vendor and purchaser, 923.

MONEY.

When impressed with the character of realty. See RESULTING TRUST.

MORTGAGE.

Primary liability of personalty for payment of, 901, 922. See EXONERATION.

When subsequent advances are protected by lien of prior mortgage, 857-870.

When advances on prior mortgage are postponed to intervening incumbrances, 865-870.

Cannot be created orally, 872.

But true nature of transaction may be shown by parol, 858, 862, 872.

Aliter in New York, 860-864.

Written agreement to give a mortgage which, for want of due execution fails at law may be sustained in equity, 954.

Valid, though without consideration, 864.

To secure future advances, binding on mortgagor and third persons with no superior equity, ib.

Record of second mortgage, not notice to holder of first, 869.

Lien of mortgage discharged by payment, without reconveyance or release, 870.

Whether after payment, mortgage can be received by oral agreement, 870, 871.

By written agreement, 871.

Effect of declaration of no off-set, 876-880.

Payment of, not necessarily extinguishment, 874.

Lien of, not impaired by taking other security or extending time of payment, 875.

Of married woman, 756.

Purchase of land subject to mortgage renders the purchaser primarily liable for its payment as between himself and the vendor, 923.

MORTGAGE, continued.

Does not render him liable directly to mortgagee, unless he renders himself so by entering into an engagement with the latter, 923.

When created by deposit of title deeds. See EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS.

See CONVERSION—PRINCIPAL AND SURETY—SURETY.

MORTGAGEE.

Renewal of lease by, enures for benefit of mortgagor, 55, 83.

With power of sale, cannot, without the express authority of the mortgagor, purchase the mortgage estate at a sale under the power, 215, 244, 250. See TACKING.

May purchase under decree of foreclosure if holder of equity of redemption is a party, 245, 246.

May buy or take a lease of equity of redemption from mortgagor, 215, 244, 250.

From prior mortgages, ib.

Although mortgagee with trust for sale, ib.

Transactions of, with mortgagor, closely scrutinized, 216, 244.

Defective execution of power aided in favor of, 367.

See APPLICATION OF PURCHASE MONEY.

MORTGAGOR.

Renewal of lease by, enures for benefit of incumbrancer, 88.

May grant lease to trustee for himself under power reserved, until entry by mortgagor, 55.

When punishable for waste. See WASTE.

NECESSARIES.

When married women can contract for, 759, 760, 761, 763.]

NOTE.

Payment after maturity, by one of several makers, extinguishes obligation, 146.

Payee must indemnify maker on accommodation, 149.

NOTICE.

Of intended misapplication of purchase money. See APPLICATION OF PURCHASE MONEY.

When purchaser of partnership property takes subject to debts of firm, 302, 310.

PARAPHERNALIA.

What constitutes, 730.

May be disposed of by husband by act inter vivos, ib.

Not by will, ib.

But wife may be put to her election with regard to, ib.

Liable to debts of husband, ib.

Widow's claim to, preferred to general legacies, ib.

Marshalling for, as against heir, ib.

Wife entitled to have redeemed when pledged by husband, ib.

Even to prejudice of his legatees, 731.

Right to, barred by settlement, ib.

By non-claim when bequeathed to her for life, ib.

Articles constituting, when considered as given to separate use, ib.

Distinction between paraphernalia and separate use, ib.

PAROL AGREEMENT.

Not enforced in favor of wife or child in absence of valuable consideration, 429.

Aliter in Kentucky, 427, 429.

When vendor's lien for unpaid purchase money discharged by, 470.

See VOLUNTARY DEEDS AND CONTRACTS.

PAROL EVIDENCE.

Admissibility of, in cases of advancement and resulting trust, 347, 351-363.

True nature of mortgage may be shown by, 858, 862, 872.

Whether agreement is co-temporaneous or subsequent to mortgage, 858, 859.

Aliter in New York, 860, 864.

Admissible to convert absolute conveyance into mortgage, 871.

Inadmissible to prove intention of testator to exonerate personally from payment of debts, 893, 929.

Inadmissible to contradict written memorandum of circumstances under which equitable mortgage, by deposit of title deeds, was made, 937.

But is admissible to extend lien evidenced by such memorandum, ib.

When admissible to contradict or explain written agreement, 1058.

Prove relation of principal and surety. See PRINCIPAL AND SURETY—SURETIES.

See ADVANCEMENT—RESULTING TRUSTS—STATUTE OF FRAUDS.

PARTNER.

Clandestinely renewing lease is trustee for the firm, 53.

May purchase share of deceased partner, 216.

Employed to purchase, cannot sell his own goods to firm, 221. See AGENT—CONSTRUCTIVE TRUST.

Outgoing partner receiving covenant of indemnity from debts may be subrogated to remedies of creditors if covenant is not fulfilled, 147.

See SUBROGATION.

PARTNERSHIP PROPERTY.

Purchase of, from one partner without concurrence of others creates no liability to see to application of purchase money, 111.

Unless purchaser has notice of intended fraud, 112. See APPLICATION OF PURCHASE MONEY.

Real estate purchased with assets, and for the purposes of partnership, is partnership property, although the legal title is in only one partner or in all as tenants in common, 276, 284, 286, 299-302.

And joint debts must be first satisfied therefrom, 286.

Principle applies to volunteers, 287.

But this right will be discharged by transfer of legal title to purchaser for value without notice, 287, 302-310.

When constructive trust in favor of partners arises, 287, 288, 289, 299. See CONSTRUCTIVE TRUST.

Doctrine in Pennsylvania, 289.

Parol agreement to bring land into partnership or share it with incoming partners, is invalid, 290, 291, 292.

When real estate is converted into personalty, 276-284, 292-299, 310, 312.

See CONVERSION, 6.

Consent of partner to deed of other partner may be by parol, 299.

Purchase by one partner with partnership funds creates resulting trusts for firm, 341.

Land purchased for partnership purposes not within Statute of Frauds, 1041.

PART PERFORMANCE OF AGREEMENT.

Doctrine of, not to be extended, 1038, 1062, 1063.

And has no application in courts of law, 1063.

Takes parol agreement for purchase of land out of Statute of Frauds, 1030, 1042.

Aliter in Tennessee, 1043.

Doctrine in Kentucky, North Carolina, Massachusetts and Maine ib.

Acts of performance must be such that they would be a fraud upon a purchaser, if contract were not performed, 1044.

Payment insufficient without possession, 1045.

Though possession may be sufficient without payment, 1045, 1046.

But mere possession under parol gift not part performance, 1046.

Unless valuable improvements have been made on faith of gift, 1046, 1047.

PART PERFORMANCE OF CONTRACT, continued.

Doctrines in Pennsylvania and Massachusetts, 1053, 1056.

Possession must be exclusive and be taken in pursuance of a right growing out of, or given by contract, 1049.

Acts merely ancillary or introductory to an agreement, not acts of part performance, 1031, 1045, 1048.

Acts must be referable to, and result from, agreement, 1044, 1051, 1052.

Nor payment of part of the consideration money, not part performance, 1031, 1054.

Nor even of the whole, ib.

But in case of deficiency of personal assets an equitable lien may attach to the land, 1054.

When consideration consists of labor and services, 1054, 1055.

Admission into possession, having reference to the agreement, an act of part performance, 1032, 1045, 1048.

A fortiori, if the purchaser has laid out money in buildings or improvements, ib.

Secus, where possession has been obtained wrongfully, 1033, 1051.

Or is a mere prolongation of anterior possession, 1048.

Attornment by vendor's tenant not sufficient delivery of possession to purchaser, 1050.

Nor is possession taken by lessee of vendee, ib.

Mere continuance in possession by tenant not an act of, 1033, 1049, 1054.

As to payment of an increased rent by a continuing tenant, 1034, 1054.

The laying out of money in improvements by a continuing tenant, if referable to the agreement, is an act of part performance, 1034, 1036, 1048.

Terms of contract must be certain and unambiguous, 1036, 1048, 1049, 1057.

But inquiries will be directed to ascertain the terms of the contract, ib.

But there can be no part performance unless there be a completed agreement, 1037, 1048.

And the contract proved must accord with that set forth in pleadings, 1051.

Companies and corporations bound by acts of part performance, 1037.

When possession of one lot or part will take another out of statute, 1050, 1053.

Requisite to decree on ground of part performance, 1050, 1053.

An agreement for an exchange may be taken out of the statute by the entry of both parties, and perhaps of one, 1060.

Effect of performance on oral agreement to devise, 1061.

Equity may give compensation where it cannot give specific performance, 1062.

Marriage not an act of part performance, 1039, 1040.

But a parol contract in consideration of marriage may be taken out of the statute by acts of part performance, independent of the marriage, 1039, 1040, 1060.

Representations upon the faith of which marriage has taken place when made good, ib.

Parol variation of a written contract decreed where there are acts of part performance, 1040, 1058, 1059. See STATUTE OF FRAUDS.

PARTY WALL.

Wrongful interference with, restrained, 1013.

PAYMENT.

Payment at the day, performance, 130, 131, 858.

Payment after the day, not extinguishment at law, unless given and received as satisfaction, 130, 858.

Payment will operate as purchase in equity, when such is the intention of the party who makes and of him who receives it, 131, 859.

Unless made by one who is bound to satisfy or extinguish and not to purchase or keep alive, ib.

Payment after the day by one of several joint debtors, will not be a bar to a suit for his use against the rest, at law, if made with the view of purchasing, and not of paying, 132.

Secus, in equity, unless the party who makes the payment is a surety, ib.

PAYMENT, continued.

By stranger, not satisfaction, unless so designed, 145, 146.

Of note after maturity by one of several makers extinguishes obligation, 146.

Whether payment by surety operates as purchase, is question of intention, 151, 874.

Payment by stranger, not extinguishment, unless authorized or ratified by debtor, 151, 152, 874.

May take effect as purchase, and entitle the person by whom it is made to sue in the name of the creditor, ib.

Lien of mortgage discharged by, without release or reconveyance, 870.

PERPETUITIES.

Direction in executory trust to settle property in violation of rule against, executed by doctrine of cy-pres, 29. See EXECUTED AND EXECUTORY TRUSTS—RESULTING TRUSTS.

PERSONALTY.

Liability of, for payment of debts. See EXEMPTION OF PERSONALTY FROM DEBTS—EXONERATION.

PIN MONEY.

Definition of, 729.

Object of, ib.

Arrears of, not generally recoverable, 729, 730

POST NUPTIAL SETTLEMENT.

See EXECUTED AND EXECUTORY TRUSTS.

POWERS.

What will be inserted in settlements directed to be made by Court in cases of executory trusts, 29.

Executors or administrators mortgaging leaseholds may give power of sale, 94.

So of trustees, with express power to mortgage, 95.

Executor may give assignee of debts power of attorney, ib.

What powers authorized by Court on sale of infant's estate, ib.

Not imported into absolute conveyance, held to be only a security, ib.

Of trustees, to give receipts when implied, 79, 86, 87.

See APPLICATION OF PURCHASE-MONEY—DEFECTIVE EXECUTION OF A POWER—EXECUTED AND EXECUTORY TRUSTS, 3—FRAUD UPON A POWER.

PRESUMPTION OF ADVANCEMENT.

How it may be rebutted or supported, 327. See ADVANCEMENT.

PRINCIPAL AND SURETY.

What constitutes relation of, 149, 150, 159, 160.

When parol evidence admissible to constitute relation of, 161, 165, 185, 188.

Debt must have been assumed at request of principal, or result from course of dealing, 146.

Surety cannot proceed against principal at law, until actual payment, 135, 180.

May file bill in equity to compel payment by principal, as soon as debt is due, 135, 180.

Creditor cannot be compelled, under ordinary circumstances, to sue principal, or exhaust securities for debt, before suing surety, ib.

Chancery has jurisdiction to compel reimbursement of surety by principal, notwithstanding extension of remedy at law, 136.

When creditor entitled to all remedies or securities held by surety, 127, 173–178.

And the same right exists on the part of surety to remedies and securities of the creditor, 126, 127, 137, 173, 178.

Although their existence was not known to the surety in the one case, or the creditor in the other, when the debt was contracted, 126, 127, 136, 174.

Surety paying off part of a mortgage debt entitled to charge on the estate, 127.

Surety entitled to all equities which creditor had against principal debtor, ib.

PRINCIPAL AND SURETY, *continued.*

- Against persons claiming under him. 127. *
- Release of surety by loss of security through neglect of creditor, 128.
- But he must pay off any further advances on security, *ib.*
- Creditor's right to tack, *ib.*
- How right to do so affected, *ib.*
- Right of surety to securities, how derived, *ib.*
- Early instances of assignment of securities to surety, *ib.*
- Surety was recently not entitled to an assignment of a debt or bond, 129, 130.
- A surety paying off a bond was a simple contract creditor, 132.
- Secus, in the case of surety for Crown debt, *ib.*
- By Mercantile Law Amendment Act, surety now entitled to assignment of judgment, specialty, or other security by creditor, 112, 113.
- A debtor paying debt entitled to assignment of judgment against himself and co-debtors, when, 133.
- But a surety upon a second bond, given as a collateral security, entitled even under old law, on payment of the debt, to an assignment of the original bond, 133.
- And will rank a specialty creditor, 133, 137, 140, 141.
- But would seem to be such, rather in respect of extent of remedy, than of nature or duration of right, 140, 141.*
- When creditor has proved the debt against the estate of the principal, he will be trustee for the surety who pays him, *ib.*
- And the surety may compel the principal creditor to go in and prove the debt, *ib.*
- Rights of sureties under successive Bankruptcy Acts, 134.
- Lien of executors of surety on legacy, *ib.*
- In priority of mortgagees of legatee, *ib.*
- Right of executor surety to testator to retain, *ib.*
- Surety for part of debt not entitled to security given for another part, in a distinct transaction, *ib.*
- Surety can only claim against his principal the amount paid in discharge of their common obligation. 134, 225. See PAYMENT—SURETIES.
- In the American Courts, generally, a surety paying a bond debt, will be entitled to an assignment of the bond, and will rank as a specialty creditor, 137, 138, 140.*
- In like manner, a surety paying the debt, will be subrogated to the creditor, in a judgment against the principal, 140, 141.*
- And in other liens, 142.*
- And in mortgages and conveyances in trust, 140, 142, 143.*
- Rule on this point in Alabama, Vermont, and North Carolina, similar to that which prevailed formerly in England, 144.*
- The equity of subrogation exists where the surety has pledged his property only, as well as where he has become personally liable, 149, 150.*
- Guarantors, insurers, and other parties who have made themselves collaterally answerable for debts, although solely at request of creditor, have the same right of subrogation on payment as sureties, 150.*
- And when, as between two parties bound by, or liable for a debt, in estate or person, the liability of one is secondary as compared with that of the other, the latter will stand in the position of a surety, and have the right of subrogation on payment, 149, 150.*
- Payment by stranger will operate as purchase, and give right of subrogation, if made with intent to buy, and so received by creditor, 151.*
- To give right of subrogation, payment must be of the whole debt and not merely partial, 152.*
- When and how far surety entitled to indemnity for costs and counsel fees incurred in defending suit brought by creditor, 181, 182.*
- Legal remedies of the surety against the principal, 180, 181, 183.*
- Application of doctrine to bills and notes, 161, 168.*
- Relation of, by strangers to consideration, in commercial instrument, depends primarily on order of signing and terms of instrument, 162.*
- Whether this applies as between accommodation drawer and acceptor, *id.**

PROBATE DUTY.

Not payable in respect of real estate directed by a will to be converted, 1139.

See CONVERSION.

Nor by direction in deed, when, *ib.*

Payable on real estate converted to partnership purposes, *ib.*

PROMISSORY NOTE.

Of married woman when binding, 758, 764.

See PRINCIPAL AND SURETY—SURETIES.

PURCHASE MONEY. *See* APPLICATION OF PURCHASE MONEY—VENDOR'S LIEN.**PURCHASERS.**

When bound to see to application of money, 78. *See* APPLICATION OF PURCHASE MONEY—JOINT PURCHASERS.

Who cannot become. *See* AGENT—ASSIGNEES OF A BANKRUPT—BARRISTER—BISHOP—CREDITOR—DIRECTOR—EXECUTOR—GUARDIAN AND WARD—MORTGAGEE—RECEIVER—STOCKBROKER—TRUSTEE.

When settlement decreed against, 34, 35.

In the names of third parties. *See* ADVANCEMENT—RESULTING TRUST, 1.

Of fictitious persons, 324.

Mortgagee viewed by equity as purchaser, 841. *See* TACKING.

Judgment-creditor is not, 843. *See* vol. 2, note to *Basset v. Nosworthy*.

Right of subrogation between joint, 147.

Defective execution of power aided in favor of, 367.

RATIFICATION.

Of fraudulent contract, 832-836.

RECEIPTS.

Power to give, for purchase-money, when implied, 79, 86, 87. *See* APPLICATION OF PURCHASE MONEY.

RECEIVER.

Cannot purchase, when, 215, 251.

RECTIFICATION OF SETTLEMENT. 32, 421.

When reconveyance ordered to carry out, 35. *See* EXECUTORY AND EXECUTED TRUSTS.

RELEASE OF POWER.

When valid and when fraudulent, 591. *See* FRAUD UPON A POWER.

RENEWAL OF LEASE.

By trustees or executor, 49. *See* CONSTRUCTIVE TRUSTS.

RESTRAINT UPON ALIENATION.

Of married woman, 713, 765. *See* SEPARATE USE.

RESCISSION OF CONTRACT.

See CONTRACT.

RESULTING TRUST.

1. When purchases taken in the name of strangers, 319, 320, 333.

Will be decreed in favor of party who is source of consideration, whether latter consists of lands, goods, money, securities or credit, 341.

Whether in one name or several jointly, 320.

Or successive, *ib.*

Custom of a manor that nominee should take beneficially is bad.

Doctrine applicable to real and personal estate, *ib.*

Bond taken in the name of another, *ib.*

Transfer of stock, 320.

Purchase of annuities, *ib.*

Policy effected on life of another, *ib.*

And to a joint advance, *ib.*

But no trust will result to defeat the policy of acts of parliament, as the Ship Registry Acts, *ib.*

RESULTING TRUST, continued.

Or any other legislative enactment, 343.

Or out of any illegal transaction, 343, 345.

Or in favor of a person who has purchased in the name of another, to give him a vote in parliament, 321.

Quære, if case of Field v. Lonsdale be rightly decided, ib.

Or in favor of an alien, 343.

Advance of purchase-money may be proved by parol evidence, 321, 341.

But the evidence must be clear, 322, 335, 336.

Evidence of the mean circumstances of the nominal purchaser is admissible, ib.

Evidence admissible against express declaration of the deed, after death of nominal purchaser, 322, 335.

Trust results, on admission by answer, of the payment of the purchase-money by the real purchaser, 322, 335.

Or on proof of declarations or admissions of the same nature. made orally or in pais, 335.

And parol evidence is admissible against denial by answer of the nominal purchaser, 322, 335.

Payment in or by a bond or note, by the release of a judgment. or in anything else which possesses value, will be a sufficient payment, 334.

Parol evidence inadmissible to prove agency of purchaser against his denial by answer, 322, 335.

Unless purchase is a fraud on principal, 322, 340.

Admissible to prove purchase with trust money, 323, 341.

On proof thereof, trust results for cestui que trust, ib.

Who may claim either the land itself or a lien on the land for the purpose of recovering the money, 341.

And the same principle applies to a purchase with partnership funds, ib.

Or by a husband with the money of his wife, 342.

Resulting trust arises from nothing but the actual payment of the consideration money, 336.

Whether it can spring from breach of parol agreement, ib.

The payment must be before, or at the time of, the purchase, 337.

A subsequent payment will not raise a resulting trust, ib.

But a payment by or out of the funds of a third person, or even of the party sought to be charged with the trust. may be sufficient if made for and on account of the cestui que trust, 338.

A resulting trust is a trust of ownership, wholly or in part, and is therefore created only by the payment of some definite part of the consideration, as such, 339, 340.

But this difficulty may be aided by presumption that the shares were equal, as against the party whose negligence has given rise to the uncertainty, 340.

No trust results for person advancing purchase-money as a loan, 323, 336.

Resulting trust may be rebutted by parol evidence, 323, 342.

Either as to part or as to the whole, 324.

On purchase in name of fictitious person, ib.

And does not arise where there is an express trust, though but by parol, ib.

General principles as to the admissibility of parol evidence, to establish resulting trust, 350, 364.

1. *Where the conveyance is gratuitous as a will or deed for nominal consideration, 352.*

Parol agreement to dispose of property in particular way will be enforced, if property is obtained on faith of such promise, 352.

So, of a promise by an heir, devisee or legatee, ib.

Grant not affected by oral trust, unless evidence establishes fraud, 351, 354.

2. *Where the conveyance is gratuitous, but purports to be for a valuable consideration.*

Parol evidence inadmissible in absence of mistake or fraud, to establish resulting trust in favor of grantor, 350, 354, 359.

Rule in Pennsylvania, 350, 357.

Aliter in favor of third persons, 359.

3. *Where there is a valuable consideration paid by the grantee.*

RESULTING TRUST, continued.

- Recovery can only be had on ground of fraud.* 359.
When a promise to buy for another converts purchaser into a trustee, 360, 364.
Rule in South Carolina, 362.
Agent advancing part purchase money, and taking title in his own name security is trustee for principal. 364.
Where purchase made in the name of another, with the view of defrauding creditors, no trust will result to the fraudulent purchaser, 343, 345.
But the trust may be enforced by or for the benefit of his creditors, *ib.*
Nor on purchase by parent, or person in loco parentis, in the name of a child or adopted child, or of a husband in the name of his wife, 324, 344. See **ADVANCEMENT.**
Resulting trust arising from the payment of the purchase-money, abolished by statute in New York, Kentucky, Minnesota and Indiana, 348, 349.
Except in favor of the creditors or the persons who make the payment, *ib.*
 2. *As between heir and next of kin, money arising from real estate directed to be sold, the trusts of which wholly or partially fail, results to heir,* 1181, 1198, 1199.
So where money impressed with character of realty is directed to be sold, *ib.*
Or where partial disposition only is made of land directed to be sold, 1182.
Or where money arising from sale is given over on event which does not happen, *ib.*
Or for a purpose which is wholly or partially void for illegality, *ib.*
As being against the Statute of Mortmain, *ib.*
or the Rule against Perpetuities, *ib.*
or the Thellusson Act, *ib.*
Principles on which cases proceed, 1183.
Blending of the proceeds of realty with personal estate immaterial, 1183, 1199.
So express direction that proceeds of sale shall be deemed personalty, *ib.*
Though followed by a declaration that lapse shall not be for the benefit of the heir at law, 1184.
Comments on Cruse v. Barley, 1184, 1185.
No resulting trust when will discloses intention that property shall be converted in all events, 1204, 1205.
Whether real property directed to be sold results to the heir as real or personal estate, 1185, 1187, 1204.
When settled or devised land is converted into money, under a power, proceeds retain character of realty, until they vest in person absolutely entitled thereto, 1201, 1204.
So of land in trust, taken by eminent domain, 1202.
Money directed to be laid out in land, devised to uses which wholly or partially fail, result so far as they fail to the next of kin, 892, 1187-1190, 1202.
Distinction between a charge upon, and an exception from, a devise, 1190-1198.
Money arising from land directed to be sold, the trusts of which wholly or partially fail, will not pass by a residuary bequest, 1193.
Unless it is expressly stated that it shall be considered as personalty, 1195.
Or the intention appears that it should pass, *ib.*
Blending of the realty with the personalty, evidence of the intention, *ib.*
As between heir at law and residuary devisee, *ib.*
Previous to 1 Vict. c. 26, the residuary devisee did not take an undisposed of sum excepted from residuary devise; it resulted to the heir at law, *ib.*
As did also a sum which lapsed or which failed on account of illegality, *ib.*
Even where the proceeds of real and personal estate were blended, 1196.
Unless by express words or by obvious intention they are comprised in the residue, *ib.*
By 1 Vict. c. 26, interests in real estates which fail by lapse, illegality, or otherwise, go to residuary devisee, unless contrary intention appears in the will.

RETAINER. *See* SET-OFF.

REVERSIONARY PERSONAL ESTATE.

Married woman cannot elect between, and other property given to her, 540.

Except under 20 & 21 Vict. c. 57, *ib.* *See* EQUITY TO A SETTLEMENT.

REVERSIONS.

Purchasers of, 809. *See* CATCHING BARGAINS—PARTNERSHIP PROPERTY.

SECURITIES. *See* PRINCIPAL AND SURETY—SURETIES.

SEPARATE USE.

Of wife not allowed at law, 684.

Allowed in equity, *ib.*

Attached to married woman's property by legislature, 655.

She can dispose of personal estate settled to her separate use, by acts inter vivos, or will, 685, 739, 741.

Although reversionary, 507.

Where she has personal property settled sufficient to satisfy words of will, it will not be held to be an execution of special power not referred to, *ib.*

Secus, where will if not held to be an execution of power, would be inoperative, *ib.*

Over a life interest in real estate settled to her separate use she has always been held to have same powers as feme sole, *ib.*

According to recent authorities married woman may dispose of estate of inheritance settled to her separate use, 686, 738.

By deed not acknowledged, 686.

Will, 686-688.

And semble even although legal fee is in married woman, 688.

Secus where separate use only extends to life interest, 689.

Married woman, tenant for life for her separate use, protector of settlement, *ib.*

Married woman concurring in breach of trust renders her separate property liable for, *ib.*

Unless restrained from anticipation, *ib.*

Property settled to, liable for her breach of trust, *ib.*

And arrears of income settled to her separate use without power of anticipation, *ib.*

But not the future income of property so settled, *ib.*

How far her contingent interests are liable, *ib.*

Trustees are not essential to the existence of separate property, 689.

And she can bind it without their assent, 690.

Unless it be rendered necessary by instrument giving her the separate property, *ib.*

Trustee with notice of assignment by married woman, liable for subsequent payments to her, *ib.*

She may give an interest in it to her husband, *ib.*

But if it consists of a fund in court her consent must be taken, *ib.*

In Pennsylvania, South Carolina, Rhode Island, Ohio, Tennessee, and Mississippi, a feme covert has no power to charge her separate estate, unless it is expressly conferred upon her by the instrument conveying or settling the estate, 735-737, 745, 748.

Rule in New York, 738-741.

In other States, 741, 747.

Husband may give property to separate use of wife, 690.

Or make himself a trustee for her, *ib.*

But his intention must be clear, *ib.*

As to parol agreement before marriage, that chattels shall be held by wife to, *ib.*

Where married woman takes only a partial interest to, with power of appointing capital, *ib.*

Power must be exercised, how, 691.

Semble, though ultimate limitation be to her heirs, executors, administrators and assigns, *ib.*

SEPARATE USE, continued.

Special power of appointment does not derogate from ownership where there is an ultimate limitation in fee to separate use of married woman, 691.

General power exercised by married woman does not render property appointed liable to her debts as feme sole, *ib.*

Though life estate be to her separate use, *ib.*

Secus, in case of fraud by her, *ib.*

Limitation in form of power may give absolute interest, *ib.*

Fund may thus be disposed of without exercise of power, *ib.*

Separate estate bound by *general engagements* of married women *in writing*, 692, 740, 742, 743, 749, 755.

As by her bond, 692, 764.

Though given to her husband, *ib.*

Or with him, *ib.*

By her acceptance of a bill of exchange, *ib.*

Or by her endorsement, *ib.*

By promissory note, 692, 742, 743, 745.

By agreement to pay additional rent for a house, 692.

To take a house, *ib.*

Separate property in Court liable for costs of married woman in a suit instituted respecting it, *ib.*

Not where she instructs solicitor to take proceedings in a suit in which she is not interested, 693.

Husband when liable, *ib.*

Application to tax solicitor's bill for suit relative to separate property must be made by next friend, *ib.*

Solicitor cannot enforce lien on separate estate, pending a reference for taxation, *ib.*

Separate property bound by engagements of married women operating as contracts, not appointments, 693, 697.

Whether separate property liable to *general engagements not in writing*, upon the ground of an implied assumpsit, 697, 698, 742, 743, 750, 752.

When wife bound by oral contract made on credit of separate estate, although merely as surety 749, 750, 759.

Contract sufficient to create charge need not be in writing though property affected is land, 752.

Separate property of married woman will be charged with her debts whenever the circumstances under, or the mode in which the debts are contracted, evince an intention so to charge it, 741, 742, 744, 746, 749.

As when the debt is contracted for the benefit of her separate estate, or for her own benefit on the credit of her estate, 742.

Or by an instrument or contract which cannot bind her personally, and may therefore be presumed to have been meant to bind her estate, 743.

Effect of married women's statutes in this country, 752.

Result in Pennsylvania, 754, 756, 758, 763.

Debt must be contracted for the benefit or on the credit of her estate, or must be imposed by the terms of the contract, 755, 757.

Rule in New York, 756.

Form of obligation immaterial if cause be adequate and intention plain, *ib.*

To charge land for improvements, work must have been done at her request and on the credit of her separate estate, 757.

Wife may employ husband as her agent, 758.

Purchases of wife on credit of her separate estate enure to her benefit, *ib.*

Aliter when she has no separate estate, *ib.*

Liability for necessities, 759, 764.

When wife is acting as feme sole trader, 762.

Husband not liable for sale made on credit of wife's separate estate, 763.

Wife may mortgage for benefit of husband or third person, 764.

Invalid contract of sale no foundation for claim for damages, 765.

Husband cannot claim contribution out of separate property for payment of his debts, 698.

Or to maintain himself and his family, *ib.*

SEPARATE USE, *continued.*

Even though his wife has eloped from him, 698.

But settlement of wife's property may be ordered by Divorce Court, when, 699.

Married woman liable under 33 & 34 Vict. c. 93, for maintenance of her husband, *ib.*

And children, when, *ib.*

Wife having separate estate may pledge her husband's credit for her maintenance, *ib.*

How far an allowance will be made to husband out of separate property when his wife is a lunatic, *ib.*

Husband paying off mortgage on his wife's separate estate may charge it to extent of mortgage, 700.

Separate estate liable when wife is made a contributory, *ib.*

Wife expressly authorizing husband to receive her separate property cannot recall it, *ib.*

So where she tacitly permits him to receive income settled to her separate use, *ib.*

Especially if he receive it for many years, and applies it for the benefit of the family, 701.

Seem, exception where there is a receiver, *ib.*

Or a purchaser for value, *ib.*

In some cases husband held accountable for one year's income, *ib.*

Wife entitled to re-imbursement when she has neither expressly nor tacitly authorized husband to receive her income, 702.

But when acquiescence could not be presumed on account of lunacy of wife, allowance made to him, *ib.*

Intention of wife may be shown from her acts, *ib.*

Husband liable for receipt of capital and savings of separate property of wife, when, *ib.*

Followed into real estate purchased in his name, *ib.*

Wife advancing a loan out of her separate estate may prove against estate of husband, 703.

Evidence of husband and wife in suit relative to her separate property whether receivable, *ib.*

A court of equity can make no decree personally against a married woman, but against her estate only, *ib.*

Extent of relief against separate estate, 703, 737, 744, 749, 752.

Where there is a clause against anticipation, 704.

Husband at common law liable to debts of wife *dum sola*, *ib.*

Married woman taken in execution with her husband, detained if she have separate property, *ib.*

Secus, if she have not, *ib.*

Wife remains liable if no action were brought during the coverture, *ib.*

Ceased at law if, after judgment recovered against herself and husband, the husband obtained his discharge in bankruptcy, *ib.*

A bill filed against her not defeated by the death of her husband, 705.

And it may be filed after his death, *ib.*

Creditors of a *feme covert* may file bill against her representatives, *ib.*

But her specialty and simple contract debts are payable *pari passu*, *ib.*

In other respects the ordinary rules of administration suits are applicable, *ib.*

Liable for breach of trust, how far, *ib.*

But administrator *ad litem* will not represent her estate sufficiently in order to determine its liability, *ib.*

Separate estate of wife not liable to her funeral expenses, *ib.*

But she may by will render it liable thereto, *ib.*

Undisposed of personal estate, if in possession, belongs to husband *jure mariti*, *ib.*

And choses in action belong to him as administrator, 706.

Undisposed of real estate descends to heir of wife, *ib.*

Husband entitled as tenant by his curtesy, *ib.*

SEPARATE USE, continued.

Wife has same power over savings of separate estate, as over separate estate, 706.

Savings from separate estate liable to her contracts, *ib.* *

Arising from property settled to separate use without power of anticipation, *ib.*

Wife will have the benefit of any outlay of husband on her separate real estate, 707.

As if he builds houses thereon, *ib.*

Savings of money remitted by husband to wife for her maintenance, separate property, when, *ib.*

Arrears of interest due at the time of second marriage in the hands of trustees, retain original character, *ib.*

Secus, where payment has been made to the lady or her order during widowhood, *ib.*

Husband and his creditors restrained from interfering with separate property, *ib.*

Inquiries directed to ascertain what chattels belong to the wife to her separate use, *ib.*

Or have been purchased with savings of her separate property, *ib.*

Solicitor not allowed to appropriate cheque for money payable to separate use of wife in discharge of debt of her husband, 780.

Indorsee for value without notice not restrained from proceeding on bill of exchange when indorsement of wife's name was forged by husband, *ib.*

Semble, married woman cannot sue alone to restrain a mere personal nuisance, though her separate property is thereby depreciated, 709.

Were she assigns her separate property to secure a debt of her husband, his property in the same security on his insolvency first applicable, *ib.*

Recognized by courts of law, *ib.*

No technical form of words necessary to create separate use, if intention is plain. 732.

What words create a separate use, 709-712, 732, 733, 735.

What will not, 712, 713, 733.

Alienation of the separate property of a married woman may be restrained, 713, 748.

She cannot assign interest of fund so settled as accruing *de die in diem*, *ib.*

Clause against anticipation valid against Englishwoman domiciled abroad, when, 714.

Does not prevent trustees getting costs out of fund, when, *ib.*

Nor husband and wife appointing fund between each other, when, *ib.*

But the restraint as well as the separate use does not arise, or ceases when woman is discovered, 715, 765.

Reason of doctrine. 765.

Immaterial that settlement directs that fund shall not be paid over or aliened by cestui que trust in any event, 767.

Restraint on alienation as well as separate use revives upon subsequent marriage, unless defeated by some act done while sole, 715, 765, 769, 770.

Aliter in Pennsylvania, 768-770.

Trust may be created in some of the States of the Union for the support of the cestui que trust, whether married or single, free from liability for debts, and without power of anticipation or alienation, 771, 772.

Judgment of Lord Langdale, M. R., in *Tullett v. Armstrong*, *ib.*

By what acts a woman during discovery acquires property unfettered by the restraint, 716, 717.

By receipt of proceeds of sale of property settled to, from trustees, 716.

By calling for transfer, 717.

When there are no trustees, *ib.*

Effect of non-conversion, *ib.*
conversion, *ib.*

May be confined to a particular coverture, 718, 771.

When not, *ib.*

Unless so restrained or defeated by some act, while sole, will arise whenever and endure as long as she is married, 715, 768, 769.

SEPARATE USE, continued.

Rule on this point in Pennsylvania, 768, 770.

Restraint on alienation cannot be dispensed with by the Court, *ib.*

Or fund settled to separate use parted with by Court, *ib.*

Or paid to party under a power of attorney, *ib.*

Property, notwithstanding restraint or alienation, may be sold to satisfy prior equity, 719.

Married woman's property settled to her, affected by lapse and acquiescence, *ib.*

May bind herself by a compromise, when, *ib.*

What words will not restrain alienation, 719, 720.

What words will, 720, 721.

Designation of particular mode of charge or alienation in gift of separate power, will not preclude a recourse to other modes, nor operate as a restraint on general power, 739, 758.

Rule on this point in Georgia, Kentucky, Virginia and Maryland, 741, 742, 746, 747.

Restraint upon alienation implied when different result would defeat donors intention, 748.

Whether settlement of woman of full age should have a clause against anticipation, 721, 722.

Extension of the equitable doctrine of separate use by 20 & 21 Vict. c. 83, amended by 21 & 22 Vict. c. 108, 722, 723.

In case of desertion of wife by husband, 722.

In case of judicial separation, 723.

Protecting order, does not protect property acquired by immoral practices by wife, *ib.*

Order, how drawn up, 724.

Wife may afterwards obtain payment of money in Court, *ib.*

Or from trustees, *ib.*

Though settled without power of anticipation, *ib.*

Effect of order when wife is executrix, *ib.*

Discharge of order, *ib.*

What constitutes declaration on part of husband, *ib.*

Irish act, ib.

Statutory extension of the equitable doctrine of separate use by Married Woman's Property Act, 1870, 725.

What property may be acquired by married woman, under, *ib.*

What investments may be made by her, 725, 726.

Policies of insurance affected by her, 727.

Remedies of husband and wife under the statute, 727, 728.

Their liabilities under, 728. *See PARAPHERNALIA, PIN MONEY.*

SET-OFF.

Executor or administrator of creditor cannot set off debt of husband to estate, against wife's equity to a settlement out of a legacy, 641. *See EQUITY TO A SETTLEMENT.*

SETTLEMENT.

See EQUITY TO SETTLEMENT—EXECUTED AND EXECUTORY TRUSTS—FRAUD ON MARITAL RIGHTS.

SHELLEY'S CASE,

Rule of, how far applicable to executory trusts, 16, 18. *See EXECUTED AND EXECUTORY TRUSTS.*

SHERIFF.

Cannot, directly or indirectly, buy at his own sale, 238, 250.

SHERIFF'S SALE,

When promise to buy for another converts purchaser into trustee, 360-364.

In Pennsylvania defendant in execution may maintain ejectment against fraudulent purchaser without tender of amount paid, 832, 836.

SLAVES,

When specific delivery of, decreed by chancery, 1100-1106.

SOLICITOR.

- Employed to purchase, accountable for profits, 222.
- Sell under decree, cannot purchase, 222.
- Nor when intervening for parties interested in sale, 222-225.
- Solicitor to commission cannot purchase the debts of the bankrupt for his own benefit, 226.
- Solicitor or attorney may purchase from his client, but he must prove that the transaction is fair, 227. See vol. 3.
- Rule laid down by Lord Eldon, *ib.*
- Not applicable if the solicitor does not act in *hac re*, 228.
- Purchase by, from client, when sustained, *ib.*
- If a solicitor or attorney who has ceased to act has acquired knowledge at the expense of his former client, he cannot sustain a purchase, *ib.*
- Unless he has communicated it to him, *ib.*
- May take mortgage for what is due to him, 229.
- Taking lease and preparing it himself, *ib.* See **ADVANCEMENT—ATTORNEY.**

SPECIFIC DELIVERY UP OF CHATTELS. See **CHATTELS—DEEDS.**

When decreed, 1111, 1117.

SPECIFIC PERFORMANCE OF AGREEMENTS.

- Jurisdiction of equity to compel, 1067, 1093.
- In case of legal invalidity of contract*, 1097.
- Insolvency*, 1099.
- Must be founded on valuable consideration, 1067.
- Relative to real property, if unobjectionable, decreed as of course where Statute of Frauds is complied with, 1067, 1094, 1095, 1096.
- Because the award of damages would not afford adequate compensation, 1067, 1093.
- In case of real estate presumption in favor of jurisdiction*, 1097.
- Aliter in case of chattels*, *ib.*
- Specific performance of agreements relating to personal chattels not decreed where damages at law afford an adequate compensation, 1067, 1095.
- See **STATUTE OF FRAUDS—PART PERFORMANCE.**
- As in the case of contract to buy stock, 1068, 1096, 1108.
- Corn, *ib.*
- Hops, *ib.*
- Transport the mail*, 1096.
- But will be decreed where damages at law cannot be correctly estimated, 1069, 1095, 1097.
- Or will not furnish a complete remedy, 1069, 1093, 1094.
- As in the case of a contract to deliver so much iron, &c., for a certain number of years by instalments, 1069, 1098.
- Or to purchase timber growing in a convenient locality, *ib.*
- Or a contract to clear timber off land *ib.*
- To purchase stone, part of a bridge, *ib.*
- To purchase articles of vertu, *ib.*
- To purchase debts proved under a bankruptcy, 1070.
- And vendor may file a bill as well as the purchaser, *ib.*
- Of contract to purchase an annuity, *ib.*
- A patent, 1070, 1097.
- To insure, 1097.
- To receive notes or chattels in payment or satisfaction of debt, 1098, 1099.
- For division of assets of firm between partners, 1099.
- To give or appropriate goods or chattels as a pledge or security, 1108.
- Although not acquired until after the contract, *ib.*
- Ante nuptial contract to relinquish right of dower*, 1097.
- To settle real and personal property, *ib.*
- Purchasers of good will agreeing to return the same intact on failure to comply with agreement, enjoined from diverting custom from vendor, *ib.*
- Where commodities fluctuate in price, parties must be active in insisting on specific performance, 1071.



SPECIFIC PERFORMANCE OF AGREEMENTS, continued.

Contract enforced on behalf of vendor for price of land in ordinary cases, 1071, 1094.

Doctrine in Pennsylvania, 1094.

When land taken by a railway, *ib.*

Trust attaching to personal chattels always enforced, 1071, 1100.

Specific performance decreed of contract to purchase Neapolitan stock, 1072, railway shares, 1072, 1097, 1108.

Shares in a joint-stock company, when, *ib.*

To accept transfers of shares not decreed where directors refuse to register purchaser's name, 1073.

Unless the refusal be wanton, *ib.*

Vendor may be trustee of shares for the purchaser, *ib.*

To accept transfer of railway shares on which nothing has been paid enforced, *ib.*

Purchaser to pay calls and indemnify vendor, when, *ib.*

Not decreed where the purchase was of mere "scrip certificates," *ib.*

Of agreement to accept shares in joint stock company decreed, when, *ib.*

Discretion of directors to forfeit shares for non-payment of calls, 1074.

No objection to specific performance that call may have been made by the company upon shareholders, *ib.*

Secus, where a person has purchased in ignorance of a winding-up order, *ib.*

Or where purchaser's name cannot be put on the register, *ib.*

Contracts for sale of shares in joint-stock banking companies must set forth numbers, *ib.*

Liability of a jobber purchasing shares, *ib.*

Must accept the shares himself and indemnify the vendor, *ib.*

Or furnish names of transferees to vendor, *ib.*

Jobber liable unless there is a complete novation of the original contract, 1075.

Liable when name of infant is given as purchaser, 1076.

Not liable where transferees' names are registered, *ib.*

After execution of transfer vendor may file a bill against the transferee to register and indemnify him, 1076.

Although by accident transfer sent for registration after the company had stopped payment, *ib.*

Presumption that directors would not refuse to register, 1077.

Specific performance decreed against purchasers of shares from the actual purchaser, when, *ib.*

To lend not decreed, *ib.*

Nor of agreements to borrow, *ib.*

Of agreement to execute a mortgage for money due decreed, 1078.

As to chattels, how resisted, *ib.*

Not decreed where defendant has nothing to deliver, *ib.*

Nor as to British ships, 1078-1080.

Distinction taken as to proceeds of British ships, 1080.

And in the case of fraud, 1081.

Re-transfer of ship to rightful owner when compelled, *ib.*

No action lies on executory contract for sale, &c., of ship without recital therein of the certificate of registry, *ib.*

Mortgage on ship cannot be revived after a discharge of mortgage duly registered, *ib.*

Though discharge given by mistake, *ib.*

Specific delivery of goods sold enforced at law, *ib.*

Equitable defence may be set up at law, *ib.*

Old Court of Bankruptcy had no jurisdiction to compel, *ib.*

Query as to the new Court, *ib.*

Contract to do works not in general enforced, 1081, 1106.

To build or repair, 1081, 1107.

To make a railway, *ib.*

To work quarries, *ib.*

Coal mine, *ib.*

SPECIFIC PERFORMANCE OF AGREEMENTS, *continued.*

To make good gravel pit, 1082.

Open drain, 1107.

Contract to build or repair enforced if incidental to other contracts, when, 1082.

When agreement for building defined, *ib.*

Not where agreement is for house of certain value, *ib.*

To do defined work upon a man's own property, 1083.

Injunction against continuing to keep out of repair, *ib.*

To build more readily granted where defendant is in possession, *ib.*

Where there have been acts of part performance, *ib.*

Decreed against railway company notwithstanding inconvenience to the public, 1084.

To enter into partnership not ordinarily decreed, 1084, 1107.

Exception where status of parties ought to be determined, *ib.*

Where there have been acts of part performance to enter into partnership for a term, *ib.*

Secus, where capital is undefined, *ib.*

Or no term fixed, *ib.*

Observations of Mr. Swanston, *ib.*

Not to grant lease when lessor might enter for breach of covenant, 1085.

Nor of tenancy for a year, *ib.*

Of hiring not decreed, *ib.*

Nor of agency, *ib.*

For sale of goodwill, when, *ib.*

Of business of attorney, 1086.

Agreements of separation between husband and wife, when, 1086.

Of covenant to refer to arbitration not decreed, *ib.*

To sell at price to be fixed by valuers or arbitrators, when decreed, 1087, 1088.

Effect of plaintiff's inequitable refusal to submit to arbitrator, 1088.

Of award when decreed, *ib.*

Not to do certain acts enforced by injunction, 1089.

Doctrine in this country, 1106.

Power of Court to award damages under Lord Cairns' Act, 1090.

Act not retrospective, 1091.

Does not apply to cases where there is a remedy at law, *ib.*

Equity can only award damages where it can decree specific performance, *ib.*

Not awarded if plaintiff has done acts to disentitle him to specific performance, 1092.

Power to give damages discretionary, *ib.*

Object of Lord Cairns' Act, *ib.*

Does not diminish the rights of suitors, 1093.

Mr. Rolt's Act, *ib.*

For leases may be decreed by the County Court, *ib.*

Contracts for the sale or delivery of slaves, when specifically enforced in equity, 1100-1105.

To refer existing disputes to arbitrators, 1106.

When execution of award compelled, 1105.

Agreement to sell or lease, 1106.

For personal efforts or services, *ib.*

STATUTE OF FRAUDS.

Contract taken out of the statute by fraud, 336, 337, 1041.

As where agent employed to buy for principal, takes the title in his own name in fraud, or without the consent of principal, 261, 263.

But not where a conveyance is made to agent with the assent of and under an express or implied agreement to hold in trust for principal, 261, 263, 336.

Unless the consideration moves from, or is paid by principal, 336, 337.

And in general, where the character or source of the consideration, or the nature of the res gestæ is such as evince or give rise to an equity or trust, apart from, or independent of the contract; because the contract then becomes immaterial, and the court will look only to the facts, 261-264, 336, 337.

STATUTE OF FRAUDS, continued.

Or when prevented from being reduced to writing by fraud, death, or other inevitable accident. 1056.

But delivering abstract of title, or giving instructions to prepare deed not sufficient. 1056.

Nor merely when it was part of the agreement that it should not be put into writing, 336, 337, 1041. *See post.* vol. 2, notes to *Woolam v. Hearn*.

To take contract out of statute in the absence of fraud, mistake or part performance, the whole or all the material parts must be reduced to writing. 1058.

If any part be unwritten, the whole will be viewed as oral, ib.

Subsequent oral variations of written contract within the statute are invalid, unless followed by acts of part performance. *ib.*

But when partly performed may be set up by defendant as a bar to specific performance. 1059.

If he has changed his own position, or acted on the faith of the variation. *ib.*

Cannot be relied upon or set up by plaintiff as a ground for specific performance. *ib.*

Whether written agreement for sale of land can be rescinded orally, ib.

Land acquired by a partnership not within the statute, 276, 1041.

But parol agreement to bring land into firm, or to share it with incoming partner, is invalid. 290, 291, 292.

Contracts taken out of the statute by admission in answer, 1041, 1061.

Unless the statute is insisted upon, 1042, 1061.

And the benefit of it expressly claimed, 729.

After admission of the contract, the statute cannot be insisted upon by answer to an amended bill, 730. *See vol. 2, note to Woolam v. Hearn.*

Objection as to Statute of Frauds may be taken by demurrer, *ib.* *See PART PERFORMANCE OF AGREEMENT—EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS.*

Resulting trusts excepted from, 321, 324, 333. *See RESULTING TRUSTS.*

So of constructive trusts. 262, 263.

See PAROL EVIDENCE—PART PERFORMANCE OF AGREEMENT.

STATUTE OF LIMITATIONS.

When bar to the remedy of surety. 145.

To vendor's lien for unpaid purchase money, 481, 496.

STEWARD.

Whether he can take lease from his employer, 225.

STOCK.

When voluntary transfer of, enforced, 433, 440, 442.

See VOLUNTARY DEEDS AND CONTRACTS.

STOCKBROKER.

Sales to and purchases from his employer set aside, 221.

SUBROGATION. See PRINCIPAL AND SURETY—SURETIES—PAYMENT.

Enforced by courts of equity with paramount authority, for the attainment of justice, and the prevention of the multiplicity of suits, between principal and surety, 136, 137, 180.

Not enforced against superior equities in third persons, 152.

Not for partial payment, or to the injury of the creditor, ib.

Nor against a legal right, 171.

Nor between partners or other co-contractors, 148, 149.

Unless one has assumed the whole debt, and thus rendered the relative liability of the other secondary, ib.

Among sureties, 149, 150, 152, 169, 170.

Whether surety can waive or assert right at pleasure, 144.

Surety will not be allowed to exercise discretion to prejudice parties interested, 144.

SUBROGATION, continued.

Equity of, exists when surety has merely pledged property, 149, 150.

Between joint debtors, 147.

In favor of creditors, 150, 173.

Guarantors, 145, 146, 150.

Partners, 147.

Joint purchasers, ib.

And generally, in favor of every one whose liability in person or estate for a debt, is secondary, against all whose liability is relatively primary, or by whom the burden of the debt ought, in equity and good conscience, ultimately to be borne, 149, 150.

When and under what circumstances, payment of debt of one man by another, will entitle the party so paying to subrogation, 145, 151, 874.

No relief in equity after adverse determination at law, 146.

Unless legal remedy is inadequate, ib.

Payment of debt by principal debtor, or other party ultimately and primarily liable for debt, viewed by equity as an extinguishment, and consequently cannot operate as a purchase, nor confer the right of subrogation, 130, 131, 151.

Immaterial that means were furnished by third party, 874.

Unless intention that security should stand is clear, 875.

Payment by surety or other party secondarily liable, will operate as a purchase, unless intended as an extinguishment, ib., 152, 874.

Whether right of subrogation to judgment or specialties, barred by Statute of Limitations, 145.

SURETIES.

When relation of, arises, 137, 149, 150.

Contribution between, 124, 147, 148, 153, 167, 168.

Doctrine not founded on contract, 124, 134, 137.

Enforced at law and in equity, 124, 135, 145, 156.

But the relief in many cases is more complete in equity than at law, 125, 135, 136, 146.

As where the sureties are numerous, 124, 154.

Where one surety is insolvent, and another pays the debt, 124, 153, 185.

Where one dies, and the surviving surety pays the whole debt, ib.

Contribution may be enforced, whether sureties are jointly or severally, or jointly and severally bound, by the same instrument, 124, 154.

Or by different instruments, if they are sureties for the same principal, and in the same engagement, 124, 154, 155.

And although a surety was ignorant that there were co-sureties, 126, 157.

And in favor of surety for original sureties, even though the latter were ignorant of existence of former, 167.

So, where co-obligor signs in belief that prior sureties were principals, 168.

But there will be no contribution where the suretyship of each, by different instruments, is for distinct portions of the same debt, 126, 154.

Or for wholly distinct things, 155, 156.

Nor where one set of sureties is substituted for the other, 156.

Nor where upon a suit brought against the principal, a new party becomes security for the common benefit of the creditors and surety, 156.

Nor in case of supplemental suretyship, 158, 168.

Nor, where the sureties have, by agreement, severed the joint liability, 169.

As to the effect of the release of one surety on the liability of the rest, when solvent, 169, 170, 171.

When one or more of them insolvent, ib.

Whether surety paying debt is entitled to dividend for whole amount from estate of insolvent co-surety, 171.

Agreement by subsequent surety to be surety for prior sureties, will preclude them from recovering contribution against him, 159, 168.

But may invest him with right of subrogation to whole debt against them, 159.

Whether such result will follow from collateral agreement, 159.

SURETIES, continued.

A co-contractor giving promise of indemnity to another is principal to that other, 160.

Agreement by subsequent surety to be answerable for whole debt, at request of debtor, and to obtain time for payment, may render him liable for whole debt to prior sureties, 158.

When parol agreement between sureties to written instrument that one shall be indemnified, will be enforced, 160.

Who are sureties, for whom, and what is the liability of each to the others, may be shown orally, even when the contract is in writing and under sale, 162, 164, 167, 186, 187, 188.

Effect of stipulation between co-sureties as to contribution between them, 165, 166, 167.

When parol evidence of such stipulations admissible, ib.

Secret stipulations inadmissible against surety who joins on faith of equal responsibility, 168.

One who does not profit by consideration is surety to the one who does, 160.

A surety can in equity claim interest from his co-sureties for the money which he has paid, 126, 180.

Liability of surety may be limited by contract, 126, 169.

Surety who has paid the debt is entitled to all securities taken by his co-sureties or by creditor, from the principal debtor, 127, 169, 170. See PRINCIPAL AND SURETY.

And this applies, in this country, generally, to bonds, judgment and decrees, as well as mortgages, 170. See SUBROGATION.

Will be discharged, if this right be impaired or violated by co-surety or by creditor, from liability to party guilty of such violation, 172.

And securities given to one surety, enure to the equal benefit of all, 171, 173.

Unless the sureties waive this equity by agreement, 172.

When security given to surety enures to benefit of creditors, 173, 179.

Remedy at law for contribution, 183.

When statute of limitations is bar to remedy of, 145.

Can only claim from principal amount actually paid for debt, 135, 225. See PAYMENT.

Cannot recover indemnity or contribution for more than he has actually paid for debt, 150.

May recover indemnity or contribution for the costs which are rendered inevitable by the default of principal, 181, 182, 184.

But not for counsel fees, or for costs which might have been avoided, 181, 182, 184.

Unless suit defended at request of co-surety or of principal, ib.

In this country, the legal remedy is more extensive than in England, and nearly commensurate with the equitable, 183.

And it exists where the sureties are numerous, and where they are bound by different instruments, and where one is dead, and, according to several decisions, where one is insolvent or out of the State, 185.

A surety cannot recover contribution until he has paid the debt, 183.

When and under what circumstances, surety entitled to indemnity or contribution, for payment of debt, for which he is not legally liable, or which has ceased to be binding, either upon him, or the principal, 180, 181, 184.

SURRENDERS OF COPYHOLDS.

To the use of wills when supplied, 366.

Rendered unnecessary by statute, ib.

Surrenders in the case of a voluntary deed not supplied when voluntary, ib.

Secus, where it is supported by valuable consideration, ib. See DEFECTIVE EXECUTION OF POWER.

TACKING.

Of mortgages, doctrine as to, 839.

Mortgagee without notice may protect himself from any intermediate incumbrance, by purchasing in the first, ib.

TACKING, continued.

Right may be affected by contract, 128.

Principle of the doctrine explained by Lord Hardwicke, 840.

Immaterial that second mortgage is in the form of a trust, *ib.*

Third mortgagee may buy in the first, *pendente lite*, *ib.*

But he loses his priority if he parts with legal estate upon a sale, *ib.*

Notice of second mortgage is immaterial if third mortgagee advanced his money without notice, 841.

And he will not be prevented from tacking, by the second mortgagee having given notice of his advancement to the first, 842.

May tack legal estate in respect of unsatisfied charges, when, *ib.*

Not in respect of satisfied charge or a satisfied term, when, *ib.*

Puisne incumbrancer cannot tack after a decree to settle priorities, 843.

Nor can a prior mortgagee who takes assignment of a third as trustee for another, *ib.*

Judgment creditor, or creditor by statute or recognizance, buying in the first mortgage, cannot tack, *ib.*

Nor in any other case where a person does not advance his money upon the faith of the real estate, 844.

Semble, judgment creditor cannot tack even since 1 & 2 Vict. c. 110, *ib.*

Opinion in *Fisher on Mortgages*, contra, *ib.*

But execution must be now executed by judgment creditor, 845.

First mortgagee advancing a further sum upon a statute or judgment without notice may tack, *ib.*

A fortiori, if he make an advance upon a mortgage, *ib.*

Secus, where mortgage is paid off before judgment is recovered, *ib.*

Subsequent mortgagee cannot tack if he advances his money with notice of a prior incumbrance, *ib.*

Even where he was also first mortgagee upon a mortgage made to secure a sum and further advances, 845, 846.

Secus, if he made the further advance without notice, 847.

Where the legal estate is outstanding, all the incumbrances are paid according to priority in point of time, 847, 848.

Priority obtained by registration under 7 Anne, c. 20, 848.

Incumbrancer having the best right to the legal estate, will be in the same state as if he had it, *ib.*

As when he has a declaration of trust in his favor, *ib.*

Or has possession of a title deed, *ib.*

Mortgagee has a right to consolidate or tack all his mortgages in redemption or foreclosure suit, 849.

Mortgagor must redeem all mortgages, *ib.*

As must a purchaser of the equity of redemption, *ib.*

And mortgagee, *ib.*

Immaterial when consolidation of mortgages took place, *ib.*

Or whether purchaser or mortgagee had notice, *ib.*

Rule applicable to equitable mortgages, *ib.*

To mortgages of equitable personality by way of trusts for sale, *ib.*

Immaterial that mortgages are held by same person, *ib.*

Or in trust for same person, *ib.*

Tacking by third mortgagee of one estate, taking transfer of first mortgage comprising the same and another estate, *ib.*

By transferee of distinct mortgages of two estates, against second mortgagee of both, 850.

Right of purchasers of the equity of redemption, when a mortgagee has consolidated mortgages, *ib.*

When purchasers take under different deeds, *ib.*

The same deed, *ib.*

Principle stated by Lord Hatherly, *C.*, *ib.*

Right of mortgagee to tack on bankruptcy of mortgagor, *ib.*

Mortgagee purchasing equity of redemption, with notice of subsequent incumbrances, takes subject to them, 851.

Unless he keep prior mortgages on foot to protect the estate, 852.

TACKING, continued.

As to the nature of statutes and recognizances, 852.

Mortgagee's right to tack debts not being a lien on mortgaged property, 852.

As against heir of mortgagor, 852, 861, 862.

Or his devisee, ib.

In the case of specialty debts, when, ib.

Simple contract debts, ib.

Not allowed as against mortgagor,

Or his creditors, ib.

Assignees for value, ib.

Devisees in trust for payment of debts, ib.

Parties entitled under charge for paying debts, ib.

The assignee of his heir, ib.

His executor, ib.

Devisee, ib.

Mesne incumbrances, ib.

Reason of doctrine, 853.

What arrears of interest may be claimed by mortgagee tacking, ib.

Doctrine of tacking one mortgage to another. not received or acted on by the courts of this country. 853, 855, 858, 860.

Purchaser for value and without notice of antecedent equity. may protect his purchase by getting legal title. although after notice. 840, 856, 857, 859.

When subsequent advances will be protected by lien of prior mortgage, 857, 870.

See MORTGAGE.

TENANT.

When restrained from altering demised premises, 1018, 1020.

TENANCY IN COMMON.

Possession of one is possession of all. 1050.

Purchases by. See CONSTRUCTIVE TRUSTS—JOINT PURCHASERS—JOINT TENANCY.

TENANT FOR LIFE.

Purchasing an incumbrance or outstanding title, is a trustee for the remainderman and reversioner, 71.

And the same rule applies to tenants in common, 70, 71.

May purchase or take in exchange lands from trustees with power to sell and exchange, with his consent, 230.

With power to lease may grant lease to trustee for himself, when, 231.

May release power to appoint amongst children, 591.

Renewal of lease by. See CONSTRUCTIVE TRUSTS—WASTE.

TENDER.

When fraudulent contract can be rescinded without tendering consideration, 833-836.

TIMBER. See WASTE.**TRESPASS.**

Threatened trespass may be restrained by injunction if irreparable injury would ensue, 1013, 1015, 1023.

Aliter if injury is trivial and defendant solvent. 1014.

Complainant must prove himself to be remediless at law. 1015, 1023.

And must be in undisturbed possession, or have established his title at law, 1018, 1022.

Public trustees restrained from acts of trespass destructive of valuable property and privileges, 1016.

See WASTE.

TRUSTEE.

Renewal of lease by. See CONSTRUCTIVE TRUSTS.

Trust will not fail for want of, 435.

TRUSTEE, *continued.*

Cannot derive any profit or advantage from trust, to the injury of cestui que trust, who are entitled to benefit of everything done by him in or about the trust, 62, 64.

Purchase of outstanding title or incumbrance by trustee, enures to use of cestui que trust. 65.

And this rule extends to executors, administrators, guardians, attorneys, agents, and all who hold fiduciary relations towards others, 62, 238.

Purchase by a trustee for sale, or by a trustee for him, from cestui que trust, will be set aside, although an adequate price be given, 212, 213, 239, 241, 253.

Principle the same whether the trustees are few or numerous, 241.

Although the sale be by auction, 214, 259.

Or by co-trustees, 214.

Although trustee has retired from trust, ib.

Or sale is before the Master, ib.

Or by assignees in bankruptcy, 215.

Or by trustee as agent for another, 215, 239, 250, 255.

On sale in his own right, 242.

Nature of sale immaterial. 263.

General trustee is incapacitated from purchasing at a sale under an adverse proceeding. 251, 252.

Purchase by stranger and re-conveyance within brief period to trustee, is presumably fraudulent, 255.

But such purchases are not absolutely void, but voidable at the option of the cestui que trust, 256, 257, 830.

And will not be set aside on application of trustee or his agent, 257.

Sale to near relative closely scrutinized, 246.

Receiver cannot purchase, 215, 250.

Nor agent employed by, ib.

Nor sheriff, tax collector or appraiser, 250, 251.

Directors of companies, when purchasers of shares by, set aside, 215, 242.

Officers of corporation, 243, 249.

Firm to which director belongs precluded from dealing with company, ib.

Purchase by trustee from bona fide purchaser, ib.

Mortgagee or annuitant with powers of sale cannot, without express authority from the mortgagor, purchase the mortgaged estate, 215, 244.

Nor can solicitor conducting sale, 215.

Mortgagee may purchase equity of redemption from mortgagor, ib.

Or from prior mortgagee selling under power. ib.

Though mortgagee purchasing has a trust for sale, 216.

Transactions between mortgagee and mortgagor viewed with jealousy, 216, 245.

Lease from mortgagor to mortgagee, ib.

Trustee who has become mortgagee of property cannot foreclose, ib.

Surviving partner can purchase share of deceased partner from representatives, ib.

Trustee cannot take a lease from himself, 217.

When authorized to do so removed from his office, ib.

But a trustee can purchase from a cestui que trust who is sui juris, and has discharged him from the trust, ib.

If there is no fraud, concealment, or advantage taken by the trustee, of information acquired as trustee, 218, 256.

Trustee may purchase with leave of court, 255.

If the interests of his cestui que trust do not suffer, 256.

So trustee who is surety for debt for which sale is made may buy, subject to right of principal to redeem on tendering indemnity, 251.

But such purchases are viewed with suspicion and the burden rests with purchaser of showing that the purchase is fair and honest, and the consideration adequate, 256, 260.

A trustee who has disclaimed without acting may purchase, 218.

As may a mere trustee to preserve contingent remainders, ib.

TRUSTEE, continued.

So trustees may purchase property of trust from Lords Commissioners acting under statutes for redemption of land tax, 218.

A trustee for infants, or persons under disabilities, cannot purchase trust estates, except by leave of the Court, *ib.*

Doctrine in Pennsylvania as to purchases by guardians at sheriff sale of ancestor's estate, 254.

May deal with *cestui que trust* in subject unaffected by trust, 218.

Remedies of cestui que trust, on purchase by trustee, 256, 257, 258, 341.

When barred by statute of limitations, 258.

Terms upon which relief will be granted against trustees or others, 234, 257-260.

When the property remains in their hands unsold, *ib.*

When it has been resold, 235.

Costs, *ib.*

Acquiescence, 236, 257, 258, 259.

In exercise of discretionary powers more prudent not to state reasons for conduct, 598.

To preserve contingent remainders, *See* WASTE.

Liability of purchaser from to see to application of purchase-money. *See* APPLICATION OF PURCHASE-MONEY.

See ADMINISTRATOR—AGENT—ARBITRATOR—ASSIGNEES OF A BANKRUPT—BARRISTER—BISHOP—COMMISSIONER, IN BANKRUPTCY—COMMISSIONER UNDER INCLOSURE ACTS—CONSTRUCTIVE TRUSTS—CREDITOR—DIRECTOR—EXECUTION CREDITOR—EXECUTORS—GUARDIAN AND WARD—JUDGE—RECEIVER—SEPARATE USE—SOLICITOR—STEWARD—STOCKBROKER—SURETIES—TENANT FOR LIFE—VALUE UNDER INCLOSURE ACTS.

TRUSTS. *See* CONSTRUCTIVE TRUSTS—EXECUTED AND EXECUTORY TRUSTS—RESULTING TRUSTS.

USUAL POWERS.

What are, in marriage articles, 29, 30, 31.

VENDEE.

When purchase of adverse title by, enures to benefit of vendor, 71.

VENDEE'S LIEN.

For prematurely paid purchase-money, 474, 475.

As against subsequent mortgagee with notice, 475.

As against interest of mortgagee selling under power of sale, *ib.*

Lien of second vendee upon interest of first, 476, 477.

Where another person under contract of sale turns out to be entitled to estate, 477.

Will not exist where vendee abandons contract by his own default, *ib.*

Nor when contract is illegal by statute, *ib.*

Secus, where vendee repudiates contract when good title cannot be made, *ib.*

Or sale is a breach of trust, *ib.*

On suit for specific performance by the vendor, *ib.*

Lien of lessee for expenditure, *ib.*

VENDOR'S LIEN.

For unpaid purchase-money, 462.

Or compensation money from railway company, 463.

Remedies against railway company, *ib.*

Attaches when there has been a conveyance, 463.

No conveyance, 464.

In case of freeholds, *ib.*

Copyholds, *ib.*

Leaseholds, *ib.*

How far adopted in this country, 481, 482.

Statement of the doctrine, 499.

When lien will or will not arise, 483, 484.

What will not discharge the lien, 484, 491.

VENDOR'S LIEN, continued.

What will discharge it, 484, 491.

May be abandoned by the vendor taking a security, to which credit is exclusively given, 464, 487, 488.

A bond taken by the vendor for the purchase-money, will not be evidence of his intention to abandon the lien, *ib.*

Nor a bill of exchange or check, *ib.*

Nor a promissory note, *ib.*

Nor will a covenant, 465, 489.

Lien for an annuity, the consideration for an estate, though secured by bond or covenant, 466, 488.

No lien for annuity or purchase-money, where the conveyance is in consideration of covenants substituted for the purchase-money, 467.

Or a bond, 467.

Or the previous grant of an annuity, 468.

Vendor to railway company for a rent-charge will not have, *ib.*

An agreement by parol will discharge the lien, 470.

Semle, may be discharged by accepting others as debtors, in place of the purchaser, when, *ib.*

No lien where vendor suffers one of several co-trustees to retain purchase-money, 471.

Nor where the purchase-money is to be paid after a re-sale, *ib.*

Nor where a totally distinct and independent security is given, as a transfer of stock, or the mortgage of another estate, 471, 484.

But semle, the intention of the vendor to give up lien must be clearly implied from the circumstances of the transfer or mortgage, 471, 484-489.

As where a mortgage is taken on part of the purchased estate, 472.

And where a mortgage on the estate is taken for part of the purchase-money, and a note given for the remainder, *ib.*

No lien, in preference to the mortgagee on a re-sale, where there has been a mortgage to raise the purchase-money, with the concurrence of the vendor, *ib.*

Lien lost as against mortgagee by the execution of deed to enable purchaser to mortgage, *ib.*

By the execution of a deed as a condition to the receipt of a legacy, *ib.*;

Marshalling for, 473. See MARSHALLING.

Is assignable by parol, *ib.*

Assignee takes, subject to prior incumbrances, 474.

Vendor's lien binds estates in the hands of the purchaser and all standing in his position, 477, 496.

Of volunteers, 478, 497.

Of purchasers for valuable consideration, with notice, *ib.*;

But not in the hands of purchaser without notice, *ib.*

Notice of the title of the vendor is not notice of the lien, *ib.*

Nor is the vendor's remaining in possession as lessee, where he has given receipt for purchase-money, *ib.*

Retention of the title-deeds by vendor, *ib.*

When legal estate is outstanding, equitable lien will have precedence over second purchaser, 478.

Unless the equity of second purchaser be better, *ib.*

As where receipt is endorsed on purchase deed and title deeds delivered to purchaser, 478, 479, 480.

Lien not enforced against property abroad, 480.

Assignees in bankruptcy, or for the benefit of creditors, take subject to the equitable lien, *ib.*

Vendor who has taken security must elect to proceed either at law or in equity, 481.

Not being an express trust may be barred by statute of limitations, 481, 496.

May be taken out of operation of statute by sufficient acknowledgment, *ib.*

And will then be enforced in equity, 481.

Not a charge by way of mortgage within 17 & 18 Vict. c. 113, *ib.*

VENDOR'S LIEN, continued.

- Primarily payable therefore out of personal estate of purchaser, *ib.*
- Vendors lien, by 30 & 31 Vict. c. 69, made a primary charge on lands of a testator, *ib.*
- Secus, in the case of lands of an intestate, 481.
- In regard to the waiver of this lien the rule in this country is, that the lien is presumed not to be waived where only the vendee's personal security is taken, and to be waived where any other security, or property or person, is taken, 483, 491.*
- Method of enforcing this lien, 491, 492.*
- Quære, if it is an original charge on the land, or only in default of personal estate, ib.*
- Quære, whether it is assignable, 492, 496.*
- When barred by lapse of time, 496.*
- How far this lien prevails against creditors in this country, 497, 498, 499.*
- Nature of this lien, 499, 502.*
- No lien on sale and delivery of chattels, 502.*
- Nor, as it would seem, when land and chattels are both conveyed by same deed, 487.*

See MARSHALLING—VENDEE'S LIEN.

VOLUNTARY DEEDS AND CONTRACTS. See DONATIO MORTIS CAUSA.

- Executory agreements, or imperfect transfers or conveyances, upon a merely voluntary consideration, which fail to pass or confer a right at law, will not be aided or enforced under ordinary circumstances in equity 420, 432, 435.*
- Will be enforced in equity where legal interest in real or personal property has been transferred, 389, 420, 422.
- Although it gets back into the hands of the donor, *ib.*
- And transfers to donor a breach of trust, 390.
- When donor has a *locus poenitentiae* after transfer, *ib.*
- Transfer made upon trust for payment of debts, without the knowledge or, concurrence of creditors, revocable, 390, 391, 423.
- And in other cases when donor means to retain dominion over property, 391.
- Secus, where trusts for creditors have been acted upon, 392.
- Or communicated to them, 392, 423.
- Or creditor is party to the deed, 393.
- Assent of creditors will be presumed in this country, to trust for their benefit, although not given expressly, and before or without the communication of trust, 423.*
- Creditor not necessarily excluded, who by accident does not execute deed within time limited, 393.
- If he act under, or on the faith of it, *ib.*
- Not allowed to disturb dividend already made, *ib.*
- Secus, where he has not performed fair conditions of deed, *ib.*
- Or has acted inconsistently with it, *ib.*
- Effect of delay or of refusal by creditor to execute deed, *ib.*
- Of setting up adverse title, *ib.*
- Principle upon which creditor's deeds are revocable do not apply to deeds in favor of objects of his bounty, 394.
- Nor where trusts come into operation on settlor's death, *ib.*
- Assignee may take steps to recover property though no creditor knows of assignment, *ib.*
- Trust deeds for benefit of creditors not evidence unless registered, *ib.*
- Whether verbal gift of chattels requires delivery, *ib.*
- Delivery of securities for a debt may be effectual as a gift, although intention is not expressed in writing, 440.*
- Donation of securities transferrable by delivery, 395.
- Evidence of gift of chattels by husband to wife must be clear, *ib.*
- Presents from husband to wife, when her separate property, *ib.*

VOLUNTARY DEEDS AND CONTRACTS, *continued*.

If settlor, retaining legal interest, constitutes himself a trustee, the trust will be enforced, 395, 438, 439.

Reason of doctrine, 437.

An instrument executed as a present and complete assignment is equivalent to declaration of trust, 438, 440.

And this is question of fact, 441, 442, 444.

Parol declaration of trust or personality sufficient, 396, 437.

It must, however, be clear, 396, 441, 442.

What will amount to declaration of trust, 397.

Mere expression of intention to divide property not sufficient, *ib*.

Lord Cranworth's dictum in *Scales v. Maude*, wrong, *ib*.

Consent by married woman before commissioners to transfer to her husband does not amount to declaration of trust, *ib*.

And she may retract at any time before the transfer, 397.

Declaration of trust by equitable owner of chose in action sufficient, 397, 432.

So, also, an assignment to the trustees by equitable owner, or a direction by him that they should hold upon trust for volunteers, and they accept the trusts, 398, 433.

Semble, not essential that trustees should accept trusts, 399, 435.

Notice of declaration of trust to cestui que trust not necessary, 400.

And does not affect priorities as between volunteers, *ib*.

Declaration of trust by owner of property which he gives by will invalid, when, *ib*.

Imperfect gift not supported as a declaration of trust, and will not be enforced, 400, 401, 445.

Executed gift or grant of either realty or personality to one in trust for another vests beneficial interest in latter though a volunteer, 433.

And notwithstanding donor retains power of revocation *ib*.

Aliter when legal title remains in donor, 434.

Unless he has done all in his power to complete the transfer, *ib*.

But it must clearly appear that donor intended to pass the right of property, 441, 442.

Mere assignments or choses in action, though no legal interest passes, supported in favor of volunteers, 401-405, 437, 443.

Executory contract to give or convey at future time, not enforced without consideration, 443.

But want of consideration no defence to bond or covenant to pay a sum certain, 444.

Intention is to be gathered from whole instrument, 444.

When instruments executory in form construed to pass present interest, 445.

Remarks of Lord Langdale in *Ward v. Audland*, 8 Beav. 201, and of Sir L. Shadwell in *Beatson v. Beatson*, 12 Sim. 291, inconsistent with later authorities, 406.

Decision of Sir J. Wigram, V. C. in *Meek v. Kettlewell*, 407, 436.

Voluntary assignment of reversionary chose in action valid, 408, 442.

Transfer of equitable interest in real property held bad—see *quære*, 409.

Distinction between assignment in trust, and declaration of trust, without or apart from assignment, 401.

Quære whether valid, 430.

Whether voluntary assignment of debt or chose in action evidenced by a written instrument will be valid without delivery of instrument, so delivered, or of deed of gift, 431, 441, 442, 1233, 1237.

Not essential that equitable voluntary assignment should be by deed, *ib*.

Distinction, when settlor having power does not compel trustees to assign, by transfer, 409, 410.

Notice of voluntary assignment to trustees or debtors not essential to its validity, 410.

But donee has no remedy against them on transfer or payment without notice, 411.

VOLUNTARY DEEDS AND CONTRACTS, continued.

Though complete, if executed under the influence of mistake or fraud, set aside, 411.

A mere voluntary contract or covenant will never be enforced, 411, 432, 435—

See DONATIO MORTIS CAUSA.

But may support an action at law, 431.

Whether it be supported by a merely meritorious consideration, as a provision for a wife or children, 412, 425, 426.

Agreements under seal enforced in this country in favor of wife or child, 427, 434, 441.

But not, it would seem, when merely parol, 427, 429, 430, 446.

Aliter in Kentucky, *ib.*

Nor in favor of other descendants or connections, 427, 441, 443, *sed quære*, 441, 443.

In Pennsylvania, extended to grandchildren, 428, 443, 447.

It would seem, however, that the gift of a chose in action, should be good without seal or consideration, when there are no means of getting it at law, and the donor has done all that he can to complete the transfer, 408, 429, 430, 431, 434.

But such gift will not be enforced if excessive, inadequate or fraudulent, 434, 442, 443.

Principle upon which cases are to be reconciled, *ib.*

Equity will give effect to a valid legal obligation, *ib.*

Volunteer may prove bond against assets of obligor, 413, 444.

Or even a promissory note, 413.

But will be postponed to debts by simple contract, *ib.*

Voluntary bond preferred to interest payable under 46th order of August, 1841, *ib.*

Issue directed as to whether bond is voluntary or for value, *ib.*

Assignee for value of voluntary bond ranks as a specialty creditor, *ib.*

Trust declared upon covenant will be carried into effect, 281.

Although trustees refuse to sue on the covenant, *ib.*

Covenantee under a voluntary covenant for a further assurance, not allowed to prove as creditor in an administration suit of the covenantor's estate, but allowed to bring action, 414.

But where equity can assess the damages, covenantor will not be sent to law, *ib.*

When voluntary bonds included in trust for payment of debts, *ib.*

Upon a bill filed by person from whom valuable consideration moved, all the trusts, even those in favor of volunteers, will be carried into effect, 414.

Valid instrument, signed, sealed, and delivered, not rendered inoperative by detention, 415, 442.

Voluntary settlement of real estate void under 27 Eliz. c. 4, against subsequent purchasers for valuable consideration, *ib.*

Of mortgagees, 415.

Even with a notice of a settlement, *ib.*

And though it be a fair provision for a wife and children, *ib.*

Law is same when voluntary settlement made by married woman, *ib.*

But if the trust is complete, volunteers until sale are entitled to have it executed, *ib.*

Exception in favor of charity, *ib.*

Voluntary settlement defeated by a conveyance for value, to the extent only necessary to give effect to the conveyance, *ib.*

Cannot be defeated by subsequent judgment, *ib.*

Cannot be defeated by conveyance for value by heir or devisee of settlor, *ib.*

Collateral evidence admissible to show that deed apparently voluntary, was executed for value, *ib.*

Settlor cannot enforce specific performance of contract for sale, 324.

Except as against a willing purchaser, *ib.*

But a purchaser from him can, 416.

Volunteers have no equity against the purchase money, *ib.*

Chattels personal, not within stat. 27 Eliz. c. 4, *ib.*

VOLUNTARY DEEDS AND CONTRACTS, *continued*.

- Settlement of, not defeated by subsequent sale, 324.
 But by stat. 13 Eliz. c. 5, a voluntary settlement of real or personal estate may be set aside by the creditors of persons largely indebted, when settlement made, *ib*.
 Intent may be express, *ib*.
 Implied from amount of debts of settlor at time of settlement, *ib*.
 Creditor under voluntary post obit bond entitled to benefit of the statute, 417.
 Effect of acquiescence in deed by creditors, *ib*.
 Inquiry directed as to acquiescence, *ib*.
 Statute 13 Eliz. c. 5, extends to future debts, *ib*.
 Creditor subsequent to settlement may file a bill if there be a prior creditor, *ib*.
 Secus, if all prior creditors have been paid, *ib*.
 Purchase from volunteers preferred to general creditors, when, 418.
 Voluntary deed executed pendente lite, to avoid execution, set aside, *ib*.
 Or where a man knows a decision is about to be pronounced against him, 418.
 Choses in action within the statute, *ib*.
 As a policy of assurance on life, *ib*.
 Semble, defendant cannot refuse to answer interrogatories which would make him liable to penalties under 13 Eliz. c. 5, *ib*.
 There are similar penalties in 27 Eliz. c. 4, *ib*.
 Voluntary and other deeds by creditors when void under the Bankruptcy Act 1869, *ib*.
 Voluntary deed void against creditors subsists for all other purposes, 419.
 Equity will not set aside voluntary deed or agreement not obtained by fraud, *ib*.
 When a voluntary executory gift can be rectified, 420, 446. *See* GIFT.
 Donee takes gift subject to conditions imposed by the donor, *ib*.
 Not reformed as against grantor, 34.

WARD OF COURT. *See* EQUITY TO A SETTLEMENT.**WASTE.**

- Distinction between waste and trespass*, 1011.
General principle on which relief is afforded in equity, 1011, 1018, 1020, 1021.
Complainant must show undisputed title, 1022.
When threatened trespass may be restrained by injunction, 1013, 1020. *See* TRESPASS.
A threat to commit waste, ground for an injunction, *ib*.
Remedy against, given as between tenants in common, 1013, 1021.
As against tenant proposing to make material alterations in the premises, 1018-1020, 1021.
 Tenant for life when directed to be without impeachment in the case of an executory trust, 31, 32.
 Remark of Lord St. Leonards on *Garth v. Cotton*, the leading case as to, 987.
 Construction of the words "without impeachment of waste, voluntary waste excepted," *ib*.
 Remarks of Sir John Romilly, M. R., on *Garth v. Cotton*, 988.
 Clause against waste rejected as repugnant to power, when, *ib*.
 Importance of the limitation to trustees to preserve contingent remainders with reference to, 988, 989.
 Even since 8 & 9 Vict. c. 106, 990.
 Will prevent tenant for years, or tenant for life, and the remainderman in fee, from felling timber in collusion, before contingent remainderman come into esse, *ib*.
 Or tenant for life being also a remainderman or reversioner in fee, *ib*.
 Waste by heir at law formerly prevented in the case of an executory devise, 990, 1021.
 According to recent decisions, equitable waste only prevented, 991.
 Where there is an intermediate tenant for life, 991, 1024.

WASTE, continued.

Where first tenant for life is impeachable for waste, he will not be allowed to commit waste by agreement with tenant for life in remainder dispunishable for waste, 991.

Ground landlord may prevent under-lessee committing, 991, 1021.

By mortgagee in fee in possession, ib.

Mortgagor in possession, 992, 1021.

In favor of judgment creditor or purchaser at judicial sale against defendant in execution, 1022.

As to permissive waste, 992, 1021.

Clause "without impeachment of waste" gives property in timber felled by tenant for life, 993.

Who cannot ordinarily be restrained from committing waste, ib.

Tenant for life without impeachment of waste will be restrained from exercising his powers contrary to conscience, ib.

As by pulling down a castle, or mansion-house, or farm-house, 994.

Malicious waste by defendant in possession restrained, ib.

By party claiming adversely against plaintiff in possession, 749.

Tenant for life without impeachment of waste restrained from grubbing up a wood, ib.

And from committing equitable waste by felling timber planted, or left standing for ornament or shelter, 995, 1013.

When clearing wild land will be restrained, 1017.

Same rule applicable to tenant in tail after possibility of issue extinct, ib.

Principle on which the Court acts, 995, 1024-1027.

Has been extended to timber at a long distance from a house, ib.

To rides or avenues through woods far from house, ib.

But not so as to protect woods through which they pass from being cut for repairs, ib.

Extended to clumps of trees planted two miles from the house, though the lands of others intervened, ib.

And to trees planted to exclude objects from view, ib.

Injunction not granted to prevent removal of timber already cut, 1024-1026.

Circumstances may render cutting of ornamental timber justifiable, 996.

As to produce uniformity when trees had been blown down by tempest, ib.

When they impede or injure growth of other ornamental timber, ib.

When they are prejudicial to healthiness of a house, ib.

But the onus of proof will lie on the persons felling the timber, ib.

How far ornamental timber will be protected when mansion-house is pulled down, 996-1000.

Tenant for life *without* impeachment of waste will be restrained from cutting saplings, 1000.

But not from felling timber merely because it is not full-grown, ib.

Tenant in tail, after possibility of issue extinct, is within the principle of equitable waste, 1001.

Restrained if one act of, established, ib.

Forms of orders restraining equitable waste, 1001, 1002.

Trust for preservation of ornamental timber enforced, 1002.

But a court of equity will not interfere with tenant in tail, ib.

Although restrained from barring his issue, or those in remainder, with reversion to the Crown, ib.

But where, under the act creating an entail, the tenant in tail was bound to maintain the mansion-house, the principle of equitable waste was held to apply, ib.

When account incident to injunction, 1023.

Whether an account is incident only to an injunction, 1003, 1023.

Seem, that it is, where there is a legal remedy for waste by felling timber, 1003-1005, 1024.

But although bill cannot be maintained, under ordinary circumstances, solely for an account, yet, when the court has jurisdiction on other grounds, an account will be granted, 1024.

WASTE, continued.

Where the waste is equitable, or there is no legal remedy, an account will be granted without an injunction, 1005.

And in all cases of waste in mines, 1004.

In pulling down mansion-house by tenant for life without impeachment of waste, 1006.

Account in respect of, when granted, *ib.*

Not when old materials are used in building a new house, *ib.*

What can be recovered by action of trover, *ib.*

By bill in equity, *ib.*

First owner of the inheritance entitled to timber, severed by act of God, as a tempest, 1007.

By a trespasser, *ib.*

Or by tenants, *ib.*

Even though there be an intervening estate of freehold in a tenant for life without impeachment of waste, *ib.*

But, *semble*, not when waste is committed by a tenant for life, *ib.*

And a tenant for life, who is also owner of the inheritance, will not be allowed to benefit by his own wrong, 1008.

Thinnings belong to tenant for life, *ib.*

And coppices cut periodically in the nature of crops, *ib.*

Trees thrown down which he would be entitled to cut, *ib.*

Gravel taken from waste of a manor, *ib.*

Where trees are felled by order of the Court, tenant for life, though impeachable for waste, will have interest of proceeds, *ib.*

Dowress entitled to one-third of income, *ib.*

And capital will be transferred to the first owner of the inheritance, *ib.*

Or to the first tenant for life without impeachment of waste, *ib.*

Rule same where trustee has cut timber, *ib.*

Court will not order timber merely ripe to be cut, when, *ib.*

Equitable tenant for life unimpeachable of waste entitled to produce of timber cut by order of Court, *ib.*

First owner of the inheritance entitled to proceeds of ornamental timber felled by tenant for life without impeachment of waste, 1009.

Or his assignees in bankruptcy, *ib.*

See case of *Lushington v. Boldero*, *ib.*

As to proceeds of ornamental timber felled by order of the Court, *ib.*

Arbitrary charge made for equitable waste when accounts cannot be taken accurately, *ib.*

Damages for equitable waste, how estimated, *ib.*

By rector or vicar, *ib.*

May fell timber for necessary repairs to vicarage, buildings, and premises *ib.*

But not for the purpose of a general repairing fund, 1010.

May sell timber to buy other timber for repairs, *ib.*

Patron may file a bill against a rector or vicar to restrain felling timber, when, *ib.*

Ordinary may take proceedings to prevent, against patron and incumbent, when, *ib.*

Remedy for, may be barred by Statute of Limitations, *ib.*

Lapse of time may be a bar to an account for waste, 1010.

As to acquiescence in, 1011.

Old writ of waste abolished, *ib.*

WIDOW.

When put to her election between dower and gifts conferred upon her by her husband, 524, 525. See **ELECTION**.

WIFE.

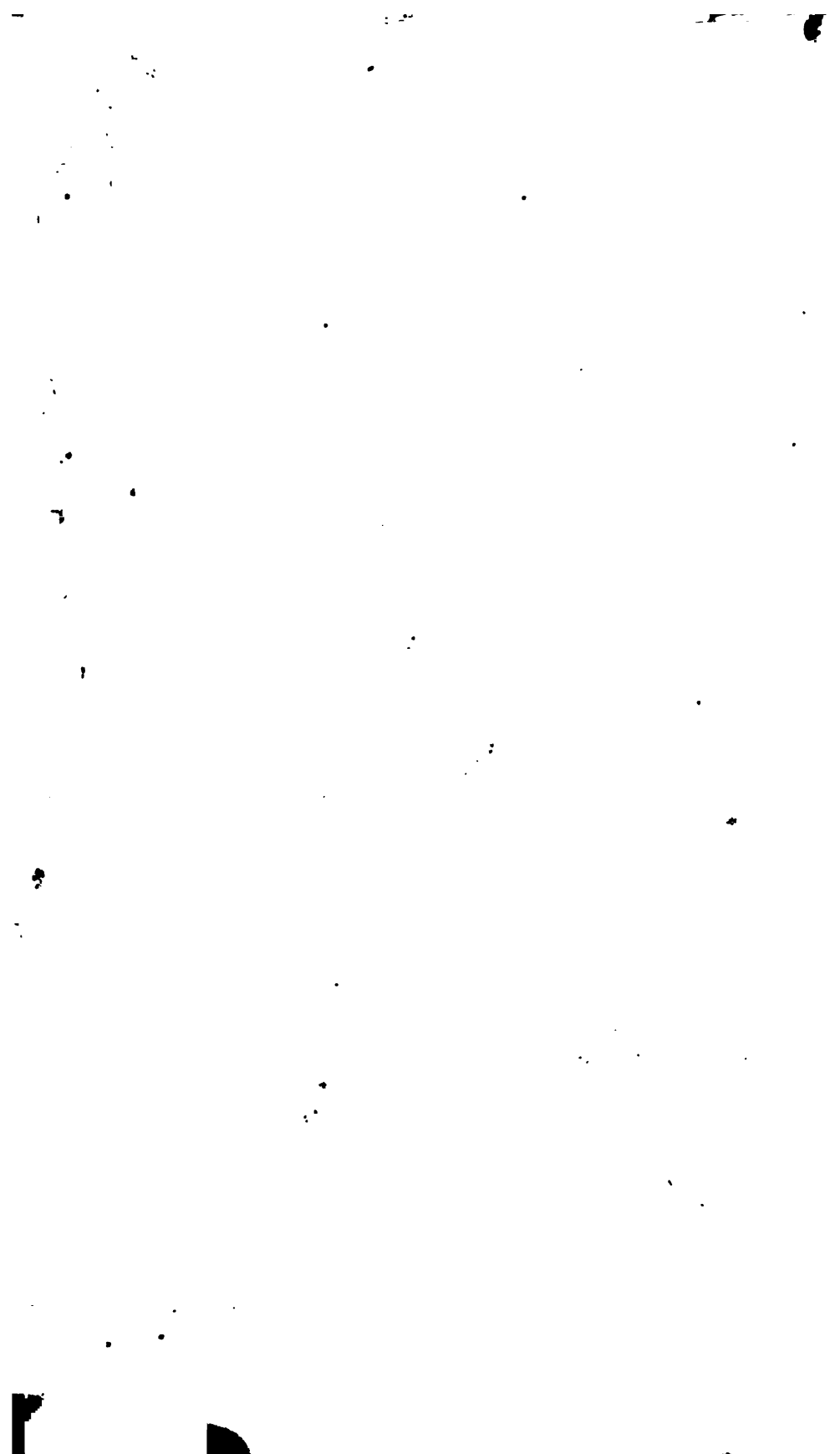
See **HUSBAND AND WIFE**.

WILL.

When invalidated by proof of undue influence, 353. See **EXROUTED AND EXECUTORY TRUSTS**.



1



1

2

3

4

5

6

7

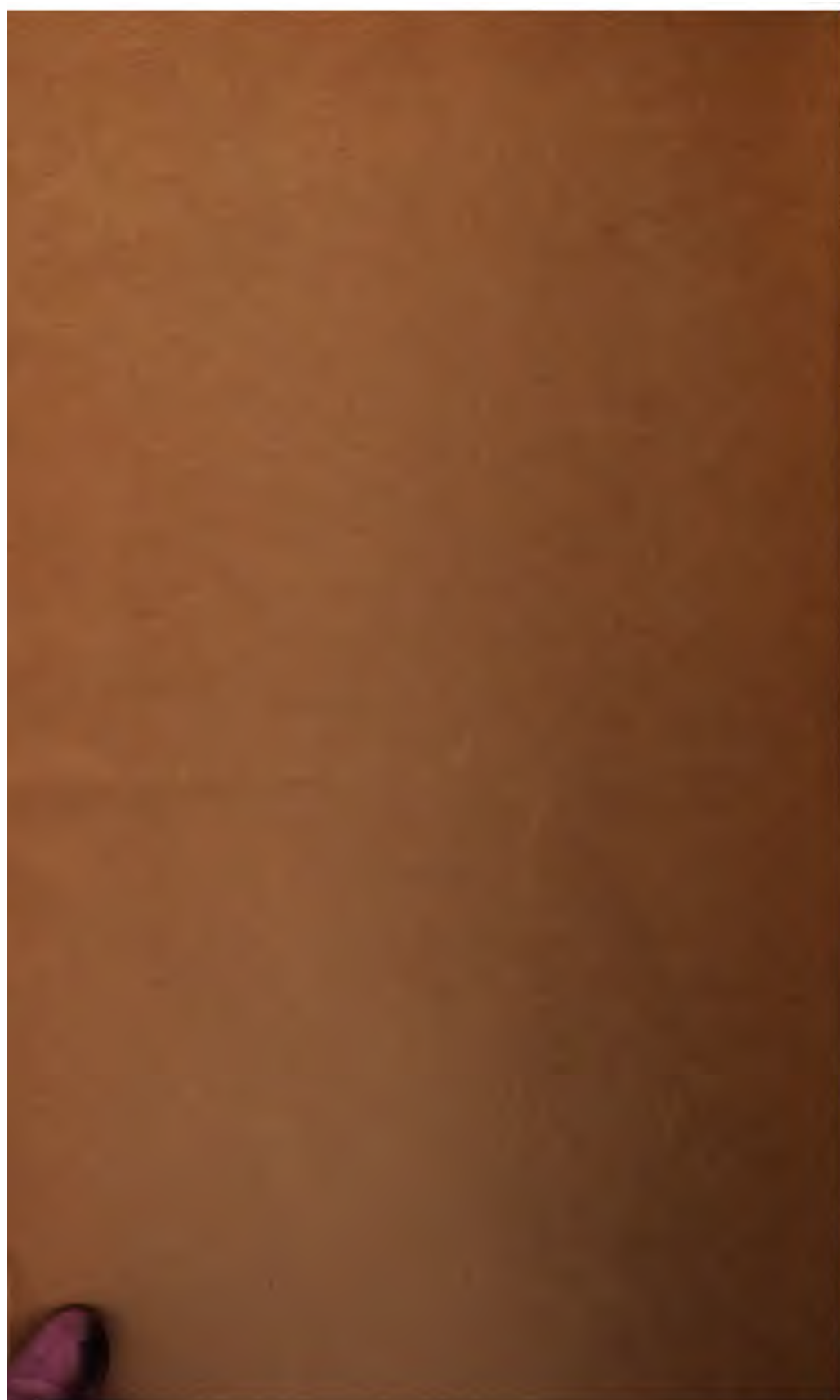
8

9

10

11

12



K	White, Frederick T.	
.W584e	A selection of leading	
AUTHOR	cases in equity, by F. T.	
1876/77	White and O. D. Tudor.	
TITLE	4th Amer. ed.	
v.1		
pt. 2	BORROWER'S NAME	ROOM NUMBER
	Library Gen. Counsel	
	Dept.	

K White, Frederick T.
 .W584e A selection of leading
 1876/77 cases in equity, by F. T.
 v.1 White and O. D. Tudor.
 pt. 2 4th Amer. ed.

LIBRARY
 of the
 General Counsel
 TREASURY DEPARTMENT
 Set No.

